In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1379
Docketed March 9, 1979

TAHOE NUGGET, INC. d/b/a JIM KELLEY'S TAHOE NUGGET,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

NEVADA LODGE,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Supplemental Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

NATHAN R. BERKE
25th Floor
One Embarcadero Center
San Francisco, California 94111
Counsel for Petitioners

Of Counsel:
SEVERSON, WERSON, BERKE & MELCHIOR
25th Floor
One Embarcadero Center
San Francisco, California 94111

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

Appendix C(1)

227 NLRB No. 72

MFJPW
D—1508
Crystal Bay, Nev.

United States of America
Before the National Labor Relations Board

Tahoe Nugget, Inc. d/b/a
Jim Kelley's Tahoe Nugget
and Case 20—CA—9738
Hotel-Motel-Restaurant Employees
& Bartenders Union, Local 86,
Hotel & Restaurant Employees &
Bartenders International Union, AFL CIO

DECISION AND ORDER

On January 28, 1976, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. General Counsel and the Charging Party filed briefs in opposition to the exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended

1. Respondent's request for oral argument is hereby denied, as the record and the briefs adequately present the issues and the positions of the parties.

Order, but for the reasons set forth below rather than for the reasons set forth in his Decision.

On August 3, 1959, the Reno Employers Council, a voluntary association of employers engaged in the casino, restaurant, and other industries, recognized and entered into a contract with Local 86 on behalf of its member-employers in the Lake Tahoe area. Respondent, Tahoe Nugget, thereafter in 1962 joined the Council and became a party to the 3-year multiemployer contract then existing between the Council and Local 86. Respondent continued to be a party to successive contracts between the Council and Local 86, including one that was due to expire on November 30, 1974.

On September 18, 1974, Respondent timely withdrew from the multiemployer arrangement and subsequently refused to bargain with Local 86, claiming that it had a reasonably grounded doubt as to Local 86's majority status among its own employees.

We agree with the Administrative Law Judge that the presumption of majority arising from the Respondent's voluntary recognition of a labor organization as the exclusive collective-bargaining representative of its employees continued after its withdrawal from a multiemployer unit and reversion to its original status. We nevertheless take this opportunity to clarify and precisely define our rationale for so joining in the Administrative Law Judge's conclusion.

Unless a majority of an employer's employees desire representation by a union, an employer cannot lawfully force representation on them by joining a multiemployer bargaining unit.[2] Respondent would thus have violated the Act when it became a party to its multiemployer contract if a

2. *Mohawk Business Machines Corporation*, 116 NLRB 248 (1956); *Dancker & Sellew, Inc.*, 140 NLRB 824 (1963), enfd. 330 F.2d 46 (C.A. 2, 1964).

majority of its employees had not desired representation by Local 86.

The Board has held, in light of the Supreme Court's decision in *Bryan Manufacturing Co.*,[3] that a respondent may not defend against a refusal-to-bargain allegation on the ground that original recognition, occurring more than 6 months before charges had been filed in the proceeding raising the issue, was unlawful.[4] Any such defense is barred by Section 10(b) of the Act, which, as the Court explained in *Bryan*, was specifically intended by Congress to apply to agreements with minority unions in order to stabilize bargaining relationships. That means that the Respondent cannot now attack the Union's majority status among its employees in the single-employer unit when recognition was originally extended and that we must accept as a fact that the Union represented a majority in that unit at that time.

The Board has consistently presumed that a voluntarily recognized union continues to be the majority representative of the unit employees.[5] This presumption is carried throughout the life of the collective-bargaining contract and thereafter. We do not think that a different result should obtain in this case.[6]

3. *Local Lodge No. 1424, International Association of Machinists, AFL-CIO* [*Bryan Manufacturing Co.*] *v. N.L.R.B.* 362 U.S. 411 (1960).

4. *North Bros. Ford, Inc.*, 220 NLRB No. 154 (1975), and cases cited therein.

5. *Shamrock Dairy, Inc., Shamrock Dairy of Phoenix, Inc., and Shamrock Milk Transport Co.*, 119 NLRB 998 (1957), and 124 NLRB 494 (1959), enfd. 280 F.2d 665 (C.A.D.C., 1960), cert. denied 364 U.S. 892 (1960); *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho and its Employer-Members*, 213 NLRB 651 (1974) (Member Kennedy dissenting).

6. We think our dissenting colleague reads too much into *Sheridan Creations, Inc.*, 148 NLRB 1503 (1964), and *Mor Paskesz*, 171

To rebut the presumption of continued majority status properly, the employer must show either that the union in fact no longer enjoys majority status or that its refusal to bargain was predicated on a reasonably grounded doubt as to the union's continued majority status.[7] If the employer desires to challenge the union's majority status, it may file a petition with the Board seeking an election. To hold otherwise, as does our dissenting colleague, would mean that formation or dissolution of, or any entry into or departure from, a multiemployer unit would, standing alone, establish objective and substantial reason to doubt the previously existing majority. But the dissent sets forth neither facts nor reasons why this should be the result. Such result would permit the questioning of majority on every change in the composition of the multiemployer unit, would deter the formation of such units, and would inhibit stability in bargaining. Before we depart from precedent to venture in this direction, far more cogent reasons are required than we perceive here.[8]

Since we are in agreement with the Administrative Law Judge that Respondent has failed to prove that Local 86 no longer in fact enjoys majority status or that Respondent's refusal to bargain was predicated on a reasonably grounded doubt as to Local 86's majority status, we find that Respondent has violated Section 8(a)(5) and 8(a)(1) of the Act by refusing to recognize and bargain with the Union.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Tahoe Nugget, Inc. d/b/a Jim Kelley's Tahoe Nugget, Crystal Bay, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

NLRB 116 (1968), which involved the lawfulness of the employers' withdrawal from multiemployer bargaining units. There the Board held that, until the employers timely withdrew from the multiemployer unit, their bargaining obligations were based on the majority status of the union representing all the employees in the unit. This holding was grounded on the principle that the multiemployer unit, once established, remains the appropriate unit for all the employees and employers until lawfully disestablished or modified. These cases, therefore, say nothing about the presumption of majority status existing originally among the employees of each employer. Once an employer lawfully withdraws from the unit, of course, it is free to justify a withdrawal of recognition by successfully rebutting the presumption.

7. See *Celanese Corporation of America*, 95 NLRB 664 (1951); *Laystrom Manufacturing Co.*, 151 NLRB 1482 (1965), enforcement denied on other grounds 359 F.2d 799 (C.A. 7, 1966); *Terrell Machine Company*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), cert. denied 398 U.S. 929 (1970); *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970); *Automated Business Systems, a Division of Litton Business Systems, Inc., a Subsidiary of Litton Industries, Inc.*, 205 NLRB 532 (1973), enforcement denied 497 F.2d 262 (C.A. 6, 1974); *Walter E. Heyman d/b/a Stanwood Thriftmart*, 216 NLRB No. 154 (1975); *James W. Whitfield d/b/a Cutten Supermarket*, 220 NLRB No. 64 (1975).

8. The presumption that a bargaining relationship, lawfully established, lawfully continues is embedded in the statute and precedent. Unrepresented and represented employees are both presumed to desire continuation of the existing status in the absence of proof to the contrary. Were there objective evidence here sufficient to raise a reasonable doubt of the Union's continuing majority, there would be no need to consider the propriety of any presumption. Although, as our colleague argues, had the Union lost its majority among the employees of any single employer it could nonetheless have compelled bargaining in the multiemployer unit, he suggests no reason to believe that it had lost that majority. At best, his argument begs the question, and replaces the common expectation of continuity with one of change.

Dated, Washington, D.C. December 16, 1976

.....

Betty Southard Murphy, Chairman

.....

John H. Fanning, Member

.....

Howard Jenkins, Jr., Member

.....

John A. Penello, Member

National Labor Relations Board

(SEAL)

Member Walther, dissenting:

I take issue with my colleagues' conclusion that the presumption of majority status flowing from the contract in the multiemployer unit survives Respondent's timely withdrawal from that unit. By a process resembling alchemy, my colleagues have concocted the existence of majority status with only the thinnest support in legal reason and have, in complementary fashion, ignored valid distinctions between the presumptions applicable to single-employer and multiemployer units.

It was some 14 years ago that the Respondent in 1962 voluntarily joined a multiemployer bargaining unit and recognized Local 86 to be the representative of its employees. No election has ever been held either in the multiemployer unit or in a unit of Respondent's own employees, nor has Respondent ever recognized or bargained with Local 86 on a single-employer basis. Thus, at no time during the course of Respondent's 14-year bargaining relationship has there been any attempt to ascertain the

majority sentiments of Respondent's employees. I cannot accept my colleagues' assertion that in these circumstances Local 86 should be presumed to be the majority representative of Respondent's employees once Respondent secedes from the multiemployer unit.

My colleagues argue that unless a majority of Respondent's employees in 1962 desired representation by Local 86 Respondent could not lawfully have forced representation on them by joining the multiemployer unit. They further note that Respondent cannot now attack Local 86's majority status among its own employees at the time of original recognition because of Section 10(b). From this my colleagues, citing cases which deal with the presumption of majority status in single-employer units, construct two entirely distinct and severable presumptions which in turn give birth to yet a third presumption. Starting with (1) a valid presumption of majority status in the multiemployer relationship, they turn back, and (2) interweave a second presumption of former majority status in the single-employer unit based upon the 10(b) prohibition against finding conduct which occurred years ago to be unlawful. From the interweaving of these two presumptions the majority manages to cenceive yet a third presumption of current majority status in the single-employer unit which otherwise has no basis in fact or in logic. While I do believe that the Board can and should base violations of Section 8(a)(5) upon legitimate legal presumptions, a violation predicated upon a presumption arising not out of fact but out of the intermarriage of two other presumptions is, in my view, not a proper basis upon which to establish a violation. It must never be forgotten that an 8(a)(5) finding effectively prevents employees from exercising their right to a free choice in the selection of a collective-bargaining

representative—a right these employees have never had an opportunity to exercise.

My colleagues' argument conveniently ignores the critical fact that, contrary to the situation in a single-employer unit, the relevant majority in a multiemployer unit is the majority of employees within the entire multiemployer unit.[9] Thus, notwithstanding the constraints imposed on the employer at the point of initial recognition (constraints which may perhaps support a presumption that the union was majority representative of the employer's employees at the time of original recognition), *once* the employer joins the multiemployer unit, it does not in theory violate the law by continuing to bargain with a union which does not have majority status among its own employees. Indeed, unless the employer has timely withdrawn from the multiemployer unit, it is required to bargain with any union representing a majority of employees within that multiemployer unit, regardless of the union's standing among the employer's own employees.[10] Consequently, the presumption of continued majority in the multiemployer situation provides no basis in fact or in law for a presumption of majority in the single-employer unit, since the former presumption exists regardless of, or even contrary to, actual majority status on a single-employer basis.

It should be recognized that the presumption of continued majority status is in fact nothing more than a convenient legal fiction employed by the Board to insure the stability of the collective-bargaining relationship by preventing frivolous and unnecessary interruptions of that relationship. As stated by the Board in *Terrell Machine Company*, "[t]his presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees."[11]

Since they are essentially legal fictions, however, presumptions should not be employed where they fail utterly to mirror reality (as when the probability of the fact presumed to be in existence diminishes to nothingness) or when their use comes up against some important countervailing policy consideration (such as employee free choice). In my opinion, the majority has here extended an acceptable and useful fiction (the presumption of continued majority status) to the point where it no longer reflects probable reality and, instead of promoting bargaining stability, works to the detriment of employee free choice.

While Respondent did not engage in any potentially improper interrogation of its employees, it did place in the record the evidence available to it supporting its position that there is a doubt as to the Union's majority status. This included: (1) evidence of Local 86's poor financial picture, (2) associationwide figures concerning Local 86 membership, (3) newspaper reports that Local 86 was reorganizing, (4) evidence of a high employee turnover rate, (5) reports of employee dissatisfaction with Local 86, and (6) reports of Local 86's inactivity. Clearly the record does not support any finding of bad faith on the part of Respondent in doubting Local 86's majority status.

I would accordingly refuse to presume that Local 86 continues to be majority representative of Respondent's employees and would require Local 86 to come forward with its own evidence of majority. As Local 86 has not done so, I would dismiss the complaint, thereby leaving the parties

9. *Sheridan Creations, Inc.*, 148 NLRB 1503 (1964), enfd. 357 F.2d 245 (C.A. 2, 1966), cert. denied 385 U.S. 1005 (1967); *Mor Paskesz*, 171 NLRB 116 (1968).

10. See *Sheridan Creations, Inc., supra.*

11. 173 NLRB 1480, 1481 (1969).

and, most importantly, the employees to the Board's representation procedures if there exists a question concerning representation in the single-employer unit.

Dated, Washington, D.C. December 16, 1976

Peter D. Walther, Member
National Labor Relations Board

Appendix C(2)

JD-(SF)-19-76
Crystal Bay, Nev.

United States of America
Before the National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California

Tahoe Nuggett, Inc. d/b/a
Jim Kelley's Tahoe Nugget
and Case No. 20-CA-9738
Hotel-Motel-Restaurant Employees &
Bartenders Union, Local 86, Hotel &
Restaurant Employees & Bartenders
International Union, AFL-CIO

Stuart R. Dvorin and Eileen H. Hamamura,
Attorneys, of San Francisco, Calif.,
for the General Counsel.
Severson, Werson, Berke & Melchior by
William W. Wertz, Attorney,
of San Francisco, Calif., for Respondent.
Davis, Cowell & Bowe by *Richard G. McCracken,*
Attorney, of San Francisco, Calif.,
for the Charging Party.

DECISION

Statement of the Case

Richard D. Taplitz, Administrative Law Judge: This case was tried in South Lake Tahoe, California, on Sep-

tember 23, 24 and 25, 1975. The charge was filed on November 19, 1974, by Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, herein called the Union. The complaint issued on August 13, 1975, and alleges that Tahoe Nuggett, Inc. d/b/a Jim Kelley's Tahoe Nugget, herein called Respondent, violated Sections 8(a) (5) and (1) of the National Labor Relations Act, as amended.

Issues

The ultimate issue is whether Respondent violated Sections 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union as the collective-bargaining representative of its bar and culinary employees. The subsidiary issues are:

1. Whether the rebuttable presumption of the Union's continued majority status which flowed from a contract in a multi-employer bargaining unit survived Respondent's timely withdrawal from that unit and was applicable to a single employer bargaining unit.

2. If the presumption did apply, whether Respondent has rebutted that presumption by affirmatively establishing that the Union had, in fact, lost its majority or by showing that Respondent had sufficient objective basis for reasonably doubting the Union's continued majority.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, Respondent and the Charging Party.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent is a corporation engaged in the operation of a gaming casino at Crystal Bay, Nevada. During the year immediately preceding issuance of complaint, Respondent's gross revenue were in excess of $500,000, and during that same year, Respondent purchased and received goods and materials valued in excess of $10,000, which directly originated outside of Nevada. In addition to employing gaming control personnel, Respondent in its busy season employs about 52 employees in its bar and culinary operation. In its low season, Respondent employs about 35 or 40 employees in that group. The culinary classifications include cooks, waitresses, busboys, bartenders and porters. Thus, it appears that Respondent, in addition to operating a gaming casino, has bar and restaurant facilities.[1]

Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act, and will effectuate the policies of the Act for the Board to assert jurisdiction. See *The Anthony Company d/b/a El Dorado Club,* 220 NLRB No. 152 and cases cited therein.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Background*

The Reno Employers Council, herein called the Association, is a Nevada corporation with an office in Reno, Nevada.

1. In a petition for an election filed by Respondent, it describes its type of establishment as "food service and gaming casino".

It is a voluntary association of employers engaged in the casino, restaurant and other industries. The Association exists, in part, for the purpose of representing its member-employers in collective bargaining and administering collective-bargaining agreements with various labor organizations including the Union. The Union and the Association entered into a multi-employer collective-bargaining contract on August 3, 1959. The Association agreed to the contract on behalf of employers it represented in the Lake Tahoe area. Succeeding contracts followed,[2] with the last effective from December 1, 1971, through November 30, 1974.[3] That contract was between the Union and the Association on behalf of the individual members thereof signatory thereto. Five employers were signatory to the contract, including Respondent.[4] Employees covered by that contract were those in the employers' bar and culinary operations at Lake Tahoe.

Respondent opened for business on July 2, 1962. Respondent joined the Association and became a party to the multi-employer bargaining agreement between the Association and the Union that was effective from November 30, 1962, through November 30, 1965. Respondent continued to be a party to the successive contracts through the one that expired on November 30, 1974.

On September 18, 1974, Respondent timely withdrew its membership from the Association.[5] On October 23, 1974,

2. In some of these contracts new employer-members of the Association were added and other employers were deleted.

3. Nevada is a right to work state and none of the contracts contain a union-security clause.

4. The signatory employers were Barney's Club, Harvey's Resort Hotel, Nevada Lodge, Sahara-Tahoe and Respondent.

5. The General Counsel concedes in its complaint that the withdrawal was timely.

Respondent refused to bargain with the Union, and Respondent has withdrawn recognition from the Union. On July 25, 1975 Respondent filed a petition for an election with the Board. That petition seeks an election among Respondent's culinary and bartender employees in a single-employer unit. The complaint alleges a refusal to bargain in that single-employer unit. The complaint alleges, the answer admits, and I find that the appropriate bargaining unit is:

> All employees employed by the Respondent in its bar and culinary operations at its Crystal Bay, Nevada operations, excluding all other employees, guards and supervisors as defined in the Act.

B. *The Testimony*

1. The testimony of Staff and the LM-2 forms

Alfred E. Staff is the bar manager for the Overland Hotel in Reno. From early July 1973 to June 7, 1974, when a trusteeship was imposed on the Union, Staff was president of the Union.[6] During that time, Staff, in addition to being Union President, was a full-time bartender. The only full-time paid union officer was Secretary-Treasurer and Business Manager E. W. Tucker. Staff testified that a number of events occurred during the summer of 1974. However, it is apparent that these events took place before the trusteeship was imposed, and the sequence of events set forth below is keyed to the June 7 imposition of the trusteeship. Otherwise, the following findings are based on Staff's credited testimony. In June 1974, the Union had about $11,000 in its treasury, and that amount was decreasing. However,

6. Staff was unsure on his dates. He averred that he believed the trusteeship was imposed in August, but that it might have been in June. Howard Lawrence, a business representative who is the chief executive officer of the Union in the Lake Tahoe area, testified that the trusteeship was imposed on June 7, 1974. I credit Lawrence.

the Union's liabilities did not exceed its assets. About that time, the Union had approximately 1,000 members, of whom between 700 and 800 were paid up in their dues.[7] Sometime before the trusteeship was imposed, the Union sent Business Manager Tucker to the headquarters of the International in Cincinnati to see if he could obtain some money to help the Union organize. The executive committee had discussed the need to obtain more members and to build the membership up to a point where the Union could have some strength when it met with the employers to negotiate the next contract. Tucker went to Cincinnati and discussed the matter with representatives of the International. He then returned and reported to the executive committee that the International would give the Union money to organize if the officers resigned, the Union went into a trusteeship, and the International administered the Union. The executive committee decided to let the International take over. The matter was brought up at the next regular meeting of the Union, and a majority of the membership voted to accept the trusteeship. The officers resigned, and on June 7 1974, the trusteeship was imposed. Al Bramlet was appointed international trustee and former Business Manager Tucker became his assistant.

During the time that he was president, Staff spoke to some Union bartenders that he worked with at the Overland Hotel, and he received comments from them to the effect that they were discouraged with the Union, that the Union didn't do anything for them, and that they did not like the way the Union was being run. Some bartenders said, "when is the Union going to be able to do anything for us," "they never do nothing for us," "what's the sense of joining a

7. The highest number of members during Staff's term of office was about 1,200.

union." He never received any compliments on the performance of the Union. In addition to talking to bartenders at the Overland Hotel, he spoke to some culinary workers at various clubs in the Reno area in an attempt to organize them. However, there is no evidence in the record that any employees of Respondent expressed dissatisfaction with the Union to Staff.

At the end of the trial, Respondent offered in evidence certain LM-2 forms for the years 1972 through 1974 which the Union had filed with the Department of Labor. Those exhibits were received in evidence. No testimony was offered to explain or interpret the exhibits. The report for 1974 states that the Union was placed under an international trusteeship on June 7, 1974, and that Bramlet was appointed international trustee. The reports show that the Union received $84,891 in dues in 1974; $74,142 in 1973; and $77,117 in 1972.

There is no evidence in the record that Respondent knew of the existence of the LM-2 forms at a time when it decided to withdraw recognition from the Union. In a similar vein, there is no indication in the record that Respondent knew of the substance of the matters testified to by Staff at that time. Respondent did not rely on those matters in deciding to withdraw recognition from the Union, and apparently Respondent is relying on them solely for the purpose of attempting to prove that the Union, in fact, did not have majority status.[8] With regard to the matters set forth below, Respondent contends that it did have a reasonably based

8. As the Board held in *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho, and its Employer-Members*, 213 NLRB No. 74, an employer's reasonably based doubt of a union's majority status must be predicated on information it had at the time of its refusal to bargain. See also, *Orion Corp.*, 210 NLRB 633, enf. 515 F.2d 81 (C.A. 7, 1975).

doubt as to the Union's majority, upon which it acted in withdrawing recognition.

2. The remarks by employees of Respondent and the newspaper articles

Dale McHatton is Respondent's manager.[9] In early September 1974, McHatton overheard Dave Wilmurth, who at the time was employed by Respondent as a cook, speaking to Union Representative Hart. Wilmurth told Hart that he was making over scale without paying dues and he asked Hart what the Union could do for him. Wilmurth then said to McHatton, "if I don't have to pay any dues and I'm making over scale now, what good are they going to do, isn't that right, Dale." McHatton replied that it was Wilmurth's problem.[10] The same day, McHatton reported the incident to Respondent's Secretary-Treasurer and Comptroller Francis R. Cannon.

About the same date, McHatton overheard waitress Pat Tucker talking to another waitress. He heard Tucker say, "I'm not going to join until I find out if they can do more than what the employer is doing for me now." McHatton also reported that incident to Cannon, who replied that Tucker had made similar remarks to him. In July or August 1974, Tucker had told Cannon that she had never belonged to the Union and that she couldn't see where the Union could do anything.

During the period between July and October 1974, McHatton overheard bits and pieces of other conversations between

9. The complaint alleges, the answer admits and I find that McHatton is a supervisor within the meaning of the Act.

10. This finding has been based on the credited and uncontradicted testimony of McHatton. The Union's records show that Wilmurth applied for membership in the Union and paid initiation fees and dues on September 20, 1975. However, that fact does not refute McHatton's assertion that Wilmurth made the remarks set forth above.

employees about the status of the Union and how many people the Union had. He testified that he could recall conversations but not the people involved. He averred that they talked about the Union going broke, the Union not having enough organized people, and their feeling that the Union could not do anything for them. He reported those bits and pieces of conversations to management officials.

Howard Schlegel was swing-shift manager for Respondent from May through December 1974.[11] In mid-September 1974, he overheard a conversation between two women in a restaurant booth at the club. One of them was Evelyn Drew, one of Respondent's casino cashiers. He heard Drew say that she didn't care for union activities and she couldn't understand what they would do for her. As a casino cashier, Drew was not within the bar and culinary employees bargaining unit. Schlegel reported the incident to Cannon. Schlegel testified that he overheard other conversations by employees in September but that he didn't recall any specific statements or any particular persons.

All of the incidents that were reported to Cannon were, in turn, reported by Cannon to Respondent's General Manager Miltonberger and Respondent's President Kelley.

Cannon credibly testified that sometime after July 22, 1974, he read articles in the Reno Journal and in the Gazette which reported that the Union was reorganizing and had brought in organizers.

3. The conversations between Respondent's supervisors and the decision to withdraw recognition

Cannon, in his testimony, was very vague on dates. He averred that he had had a number of conversations with McHatton and Schlegel between the end of July and the early part of October 1974, but that he didn't remember

11. Schlegel was a supervisor within the meaning of the Act.

dates. On one occasion he asked McHatton if there had been any union activity around, and McHatton said that there had been people in there.[12] Cannon asked McHatton if McHatton heard any information from the employees about the Union. McHatton replied that there had been some discussion with people and remarks were made to the effect that they couldn't see what the Union could do for them. Cannon had a similar discussion with Schlegel.

After expressing considerable ambiguity on the dates, Cannon averred that he had a discussion with Respondent President Kelley and General Manager Miltonberger during the first part of August 1974. Kelley asked Cannon whether there ever had been any grievances filed, and Cannon replied that to his knowledge there had been none.[13] They also discussed the amount of turnover among Respondent's employees. The turnover ratio was about 4 to 1 a year, with four employees being hired for every one that remained per year.[14] Kelley asked Cannon whether Cannon thought

12. McHatton testified that he couldn't "recollect" whether he had seen Union business agents on the premises for business purposes during the 13 years he was day-shift manager before September 1974. Schlegel testified that during the time he worked on the premises between May and December 1974, he saw one union representative in September, and that was Bob Hart. Business Representative Lawrence testified that he had several conversations with Schlegel on the premises between June and September 1974, as well as two or three such conversations after September. I credit Lawrence.

13. Cannon testified that he didn't recall anything being filed showing violations, that he was not aware of any contract violations, and that it was Respondent's policy to abide by the contract.

14. Though the turnover ratio varied considerably with different groups of employees, it was approximately 4 to 1 among the culinary employees as well as the average for the employees as a whole. The turnover for cashiers was small, but for dishwashers it ran about 10 to 1, for bus personnel, 6 or 8 to 1, for porters, 8 to 1, and for cooks, 4 to 1. A compilation from Respondent's records, which was prepared shortly before trial, showed that of approximately 102 culinary employees who were on Respondent's payroll sometime in 1974, 21 had been employed at some point in 1973, and 10 had been employed at some point in 1972. Respondent's average employed complement in its peak season was about 87, and in its low season about 55, with the high in the culinary unit about 52 and the low about 35 or 40.

the Union had sufficient membership in the operation at the lake. Cannon replied that he didn't think the Union had controlling membership because of the amount of personnel turnover. He also told Kelley that he had been informed by McHatton and Schlegel that they had been told that the Union couldn't do anything for the employees. In addition, he said that the rumor was that the Union had about 800 to 1,000 members in the entire area. Cannon also told Kelley that they had never had any correspondence as far as an election was concerned.

On September 10 or 12, 1974, Cannon, Kelley and Miltonberger had another meeting. At that meeting Kelley asked Cannon whether they should withdraw from the Association. Cannon replied that management felt that the Union didn't have enough employees to win an election, and he recommended to Kelley that they withdraw recognition from the Union. He also said that the Association should be notified that they were withdrawing. He told Kelley that the rumor was that the Union was financially in trouble and that the Union was trying to organize and obtain funds from out of state in order to continue their organizing. Miltonberger said that he felt the same as Cannon, and that the Union did not represent the majority of the employees at that time.

Cannon, Miltonberger and Kelley met again on September 16, 1974. Cannon said that he didn't think that the Union represented the employees and that based on the information he had received, both directly and indirectly, they should challenge the Union as far as an election was concerned. He

said that the turnover was so great that he could not see how the employees would bring in a vote for the Union. At that meeting, the three of them made the decision that the Union's majority status should be challenged.

4. The Union's demand for negotiations and Respondent's refusal

The last contract expired by its terms on November 30, 1974. By letter dated July 22, 1974, Union International Trustee Al Bramlet notified Respondent of his desire to change and modify the contract and sought to arrange for collective-bargaining negotiations. By letter dated September 18, 1974, to the Association, Respondent resigned its membership in the Association and withdrew its authorization for the Association to represent it in connection with collective bargaining or labor relations. A copy of that letter was sent to the Union with a covering letter dated September 18, 1974, notifying the Union that the outstanding contract was terminated effective as of the term thereof. By letter dated September 27, 1974, Phillip Bowe, the Union's attorney, acknowledged Respondent's September 18, 1974, letter withdrawing from the Association and requested Respondent to contact Bramlet to discuss a convenient time for negotiations. By letter dated October 11, 1974, Respondent informed the Union that it had never dealt with either Bowe or Bramlet, that it understood that Bramlet represented a local in Las Vegas, and that it did not understand the Union's request. Bowe responded by letter dated October 15, 1974 in which he told Respondent that Bramlet had been appointed international trustee and that Tucker was Bramlet's assistant. On October 18, 1974, Bowe once again wrote to Respondent demanding that negotiations begin. By letter dated October 23, 1974, Respondent's attorney, Berke,

reminded the Union that Respondent had previously withdrawn from the multi-employer unit and notified the Union that if its demand for bargaining was a request to bargain in a single-employer unit: "then at the instructions of our client, we inform you that our client has a genuine doubt that your local represents an uncoerced majority of its employees in an appropriate unit." The letter went on to state that Respondent would fulfill whatever legal obligations it had if the Union won a Board-conducted election.

The Union filed the unfair labor practice charge on November 19, 1974, in which it alleged that Respondent unlawfully refused to recognize and bargain with it.

Respondent admits that commencing on or about October 23, 1974, it has refused and continues to refuse to bargain collectively with the Union and has withdrawn recognition from the Union.

On July 25, 1975, which was about 9 months after the refusal to bargain and about 8 months after the filing of the charge, Respondent filed a petition for an election with the Board.[15]

C. *Analysis and Conclusions*[16]

1. The presumption of majority

As the Board held in *Walter E. Heyman d/b/a Stanwood Thriftmart,* 216 NLRB No. 154:

> A contract, lawful on its face, raises a presumption that the contracting union was the majority represent-

15. That petition mistakenly shows the contract expiration date as February 15, 1975. In fact, the contract expired on November 30, 1974.

16. Much of the legal analysis set forth below is the same as that which is contained in my Decision in *Sahara-Tahoe Corporation, d/b/a Sahara Tahoe Hotel,* JD-(SF)-9-76 (issued Jan. 21, 1976), a case that involved many of the same legal principles.

ative at the time the contract was executed, during the life of the contract, and thereafter.[2]

2. *Shamrock Diary, Inc.*, 119 NLRB 998, 1002 (1957), and 124 NLRB 494, 495-496 (1959), enfd. 280 F.2d 665 (C.A.D.C.), cert. denied 364 U.S. 892 (1960).

The legality of the Union's initial recognition by Respondent is not subject to attack in this case. In *Stanwood Thriftmart,* the Board said:

> The Board has held that events time-barred by the limitations provision of Section 10(b) of the Act may not be used to overcome the presumption of majority status raised by a contract valid on its face. The contract contains a clause which recognized the Union as majority representative and a lawful union-security clause. The legality of the Union's initial recognition by Respondent was precluded by Section 10(b) of the Act from being attached [sic] at the time of Respondent's termination of the contract and withdrawal of recognition from the Union. Therefore, we find that Respondent may not defend its refusal to continue to recognize and bargain with the Union by an attack on its initial recognition of the Union. [Footnote omitted.]

In the instant case, the presumption of continued majority status is based on a contract in a multi-employer bargaining unit. The complaint alleges a refusal to bargain in a single-employer bargaining unit. A serious question is presented whether the presumption of continued majority which flowed from the existence of the multi-employer contract survived the withdrawal of Respondent from the multi-employer unit and can be applied to the newly-created single-employer unit. There has never been any contract between Respondent and the Union in the single-employer unit and, therefore, any presumption of majority must flow

from Respondent's inclusion in the multi-employer contract that expired on November 30, 1974.

In *Downtown Bakery Corp.*, 139 NLRB 1352, enf. den. in pert. part 330 F.2d 921 (C.A. 6, 1964), a successor employer refused to bargain with a union where that union was the Board-certified representative of the employees in a multi-employer bargaining unit which included a predecessor employer. In that case the predecessor employer had signed a separate collective-bargaining agreement with the union. Relying on a presumption of continued majority, the Board found that the successor employer violated Section 8(a)(5) of the Act by refusing to bargain with the union in the single-employer unit. The Sixth Circuit Court of Appeals refused to enforce the Board's bargaining order, holding in part that there was not sufficient evidence in the record to support a finding of majority status of the union.

In *The Richard W. Kaase Company,* 141 NLRB 245, enf. den. in pert. part 346 F.2d 24 (C.A. 6, 1965), a similar factual pattern was presented, and the Board followed its *Downtown Bakery Corp.* precedent. In *The Richard W. Kaase Company* case, a union was certified as the collective-bargaining agent of the employees of employers in a multi-employer bargaining unit which included a predecessor employer. That employer executed a separate collective-bargaining agreement. Thereafter, a successor employer continued to recognize the predecessor's contract but later withdrew recognition. The Board found that the successor violated Section 8(a)(5) of the Act. The Sixth Circuit Court of Appeals once again refused to enforce the Board's order, holding: "the ambiguity inherent in the multi-employer election here relied on vitiates its efficacy to prove a majority as to any single employer."

The Board law established by the *Downtown Bakery* and *Richard W. Kaase Company* cases is not directly applicable to the instant situation. In each of those cases, the individual employer had signed separate collective-bargaining contracts with the union and the presumption of continued majority could flow from those contracts rather than from the multi-employer certification. In the instant case, the initial collective-bargaining relationship was in a multi-employer bargaining unit and the contracts to which Respondent was a party were multi-employer bargaining contracts.[17] However, I believe that the presumption of continued majority flowing from the multi-employer contracts requires a derivative presumption of the Union's majority status which is applicable to each of the employer-members of the multi-employer bargaining unit separately. Unless a majority of an employer's employees desire representation by a union, that employer may not lawfully force representation on them by joining a multi-employer bargaining arrangement. *Mohawk Business Machines Corporation,* 116 NLRB 248; *Dancker & Sellew, Inc.,* 140 NLRB 824, enf. 330 F.2d 46 (C.A. 2, 1964). Thus, Respondent would have violated the Act in 1962 when it became party to the multi-employer collective-bargaining agreement if a majority of its employees did not desire representation. Any unfair labor practice charge relating to such a violation would have had to have been filed within 6 months from that time. Respondent may not now either attack the initial bargaining relation or use it to establish a defense to a refusal to bargain complaint. As the Board held in *North Bros. Ford, Inc.,* 220 NLRB No. 154:[18]

17. It is also noted that, unlike the instant situation, both those cases involved conflicting representational claims by rival unions.

18. See also *Walter E. Heyman d/b/a Stanwood Thriftmart, supra.*

Section 10(b) of the Act confines the issuance of unfair labor practice complaints to events occurring during the 6 months immediately preceding the filing of a charge and has been interpreted by the Supreme Court to bar finding any unfair labor practice, even though committed within that period, which turns on whether or not events outside that period violated the Act. *Bryan Manufacturing Co.*[3] The Court, holding that maintenance and enforcement of a contract more than 6 months after recognition of a minority union did not violate the Act, relied in part on the legislative history indicating that Congress specifically intended Section 10(b) to apply to agreements with minority unions in order to stabilize bargaining relations. Noting that labor legislation traditionally entails compromise, the Court observed

> that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in "industrial peace which it is the overall purpose of the Act to secure."[4]

The Board, in light of *Bryan,* has since held that Section 10(b) is applicable to a refusal-to-bargain defense that the bargaining relation was unlawfully established.[5]

3. *Local Lodge No. 1424, IAM, AFL-CIO* [*Bryan Manufacturing Co.*] *v. N.L.R.B.,* 362 U.S. 411 (1960).

4. Id. at 428, citations omitted.

5. *Barrington Plaza and Tragniew, Inc.,* 185 NLRB 962 (1970), enforcement denied on other grounds *sub nom, Tragniew, Inc., and Consolidated Hotels of California v. N.L.R.B.,* 470 F.2d 669 (C.A. 9, 1972); *Roman Stone Construction Company, and Kindred Concrete Products, Inc.,* 153 NLRB 659, fn. 3 (1965).

Respondent may not, at this late date, attack either the initial recognition of the Union by Respondent or the initial contract. It cannot defend against the refusal to bargain complaint on the ground that the original contract was entered into at a time when the Union did not represent a majority of the employees of Respondent. Nor can it defend on the ground that the Union did not represent a majority of the employees in the overall multi-employer bargaining unit. That contract must be considered valid on both those grounds. The presumption of majority status which continued over the years based on successive contracts applies both as to the employees of Respondent and to the employees in the multi-employer unit. I therefore find that the General Counsel has properly relied on that presumption to establish the Union's majority in the unit in question. It remains to be considered whether Respondent has successfully rebutted that presumption.

2. The attempt to rebut the presumption

a. *The background law*

In *James W. Whitfield d/b/a Cutten Supermarket,* 220 NLRB No. 64, the Board summarized the existing law, holding:

> It is well settled that Section 8(a)(5) and Section 8(d) of the Act require an employer to recognize and bargain in good faith with the bargaining representative selected by a majority of its employees. That recognition establishes a presumption of majority status which, in circumstances such as this, may be rebutted.[6] The employer may lawfuly refuse to bargain with the union if it rebuts the presumption by affirmatively establishing that the union has in fact lost its majority status, or shows that it has sufficient objective bases for reasonably doubting the union's continued

> majority status.[7] To establish sufficient objective bases, however, requires more than the mere assertion thereof based upon the employer's subjective frame of mind.[8] Furthermore, the employer must not have engaged in any conduct tending to encourage employee disaffection from the union.[9]

---

6. Cf. *N.L.R.B. v. Frick Company,* 423 F.2d 1327 (C.A. 3, 1970); *Keller Plastics Eastern, Inc.,* 157 NLRB 583 (1966).
7. *Celanese Corporation of America,* 95 NLRB 664, 672 (1951); *Peoples Gas System, Inc.,* 214 NLRB No. 141 (1974).
8. *Laystrom Manufacturing Co.,* 151 NLRB 1482 (1965), enforcement denied 359 F.2d 799 (C.A. 7, 1966); *Automated Business Systems, Inc., a Division of Litton Business Systems, Inc.,* 205 NLRB 532 (1973), enf. denied 497 F.2d 262 (C.A. 6, 1974).
9. *Peoples Gas System, Inc., supra.*

In *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho and its Employer-Members,* 213 NLRB No. 74, the Board held that these principles are equally applicable whether the union was certified by the Board or was recognized without Board certification. In that case, the Board held that the existence of a prior contract, lawful on its face, raised a presumption that the union was the majority representative at the time the contract was executed and also raised the presumption that the union's majority continued at least through the life of the contract. The Board held that "Following the expiration of the contract . . . the presumption continues and, though rebuttable, the burden of rebutting it rests on the party who would do so . . . ."

The complaint does not allege that Respondent engaged in any unfair labor practice other than the refusal to bargain. There is no contention that Respondent engaged in any other conduct tending to encourage employee disaffection from the Union.

b. *The alleged actual loss of majority*

For the reasons set forth above, the presumption of continued majority which flowed from the contract, survived the change in the bargaining unit and applied to the single employer unit. It follows that the change in the unit is not in itself proof that the Union no longer represented a majority of Respondent's employees.

In June 1974 the Union had about $11,000 in its treasury and that amount was decreasing. However, the Union's liabilities did not exceed its assets, and even if they did the Union's financial condition would not indicate how many employees the Union actually represented.

About that time the Union had approximately 1,000 members, of whom between 700 and 800 were paid up in their dues. Those are industry-wide figures and there is no way to tell from them how many of Respondent's employees were union members. Even if Respondent had established that a majority of its employees were not members of the Union, such a showing would not be the equivalent of establishing a lack of desire of those employees for union representation. Employees may desire representation without wanting to join a union or pay dues. *Orion Corp.*, 210 NLRB 633, enf. 515 F.2d 81 (C.A. 7, 1975). As the Board stated in *Wald Transfer & Storage Co.*, 218 NLRB No. 73:

> It has been clearly established that a distinction exists between union membership and union support, foreclosing relying upon one as evidence of the other. Here, union membership being voluntary in this right-to-work State emphasizes that distinction. Many employees while approving of the Union may not choose to give it their financial support *or* participate as members.[3]

3. See *Terrell Machine Company*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), cert. denied 398 U.S. 929; *N.L.R.B. v. Gulfmont Hotel Company*, 362 F.2d 588, 592 (C.A. 5, 1966).

The Union sought funds from the International to organize employees in the industry and to build up its membership so that it would have strength in negotiating the next contract. The Union also accepted International trusteeship. Those facts, however, do not indicate whether or not Respondent represented a majority of Respondent's employees. The Union wanted to obtain more members in the industry and it engaged in some internal revisions, but it would be sheer speculation to make an evaluation based on those facts as to the number of Respondent's employees the Union actually represented.

Some of the bartenders at the Overland Hotel in Reno told Staff, in substance, that they were dissatisfied with the Union. There is no evidence in the record that any of the employees of Respondent ever expresed dissatisfaction with the Union to Staff.

There is nothing in the LM-2 forms filed by the Union that can be read to indicate that a majority of Respondent's employees did not want representation by the Union.

The above matters in themselves and when considered in connection with the matters set forth below relating to Respondent's claimed reasonable doubt as to the Union's majority, fall short of establishing that the Union in fact did not represent a majority of Respondent's employees.

C. *The alleged reasonably based doubt of the Union's majority status*

Respondent made its decision to question the Union's majority status on September 16, 1974. That decision was made while Respondent was still part of the multi-employer bargaining unit and still bound by the multi-employer contract. At the same time that it decided to question the Union's majority, Respondent also decided to withdraw

from the Association. The withdrawal from the Association took place 2 days later on September 18, 1974, and both Respondent and the Union were notified. However, Respondent did not notify the Union that it questioned the Union's majority status until October 23, 1974. Respondent did not file a petition for an election until July 25, 1975.

The Board has long held that questions relating to an employer's reasonably based doubt as to a union's continued majority cannot be resolved by the application of any mechanical formulas and can only be answered "in the light of the totality of all circumstances involved in a particular case." *Celanese Corporation of America,* 95 NLRB 664. In the instant case Respondent has raised a number of matters on which it claims to have based a reasonable doubt as to the Union's majority. These matters must be considered in the context of the major disruption in the bargaining unit which occurred when Respondent withdrew from the Association and the filing by Respondent of a petition for an election. Also to be considered, however, is the fact that Respondent made the decision to question the Union's majority before it withdrew from the multi-employer bargaining unit and the fact that Respondent did not see fit to file a petition for an election until some 10 months after it decided to question the Union's majority.

At a meeting during the first part of August 1974, Respondent's Secretary-Treasurer and Comptroller Cannon told General Manager Miltonberger and President Kelley that the rumor was that the Union had about 800 to 1,000 members in the entire area. Membership in the Union is one factor to be considered. *People's Gas System, Inc.,* 214 NLRB No. 141; *Convair Division of General Dynamics,* 169 NLRB 131. However, Cannon's remarks were not only based on rumor but were keyed to union membership in the

industry as a whole rather than to membership among Respondent's employees. In addition, as is set forth in more detail above, a lack of employee membership cannot be equated to a lack of desire of employees for union representation. *Orion Corp., supra; Wald Transfer & Storage Co., supra.*

Sometime after July 22, 1974, Cannon read articles in local newspapers which reported that the Union was reorganized and had brought in organizers. Cannon's testimony with regard to those newspaper articles gives little support for his contention that he reasonably doubted the Union's majority status.

At a meeting on September 10 or 12, 1974, Cannon reported to the other Company officials that the rumor was that the Union was financially in trouble, and that the Union was trying to organize and obtain funds from out of state. Rumors are not objective criteria. In any event a union may have financial difficulties whether or not it represents a majority, and organizational activity only indicates that a union desires more members than it has.

At the meeting in the first part of August 1974, Cannon told the other officials of Respondent that, to his knowledge, no grievances had ever been filed by the Union.[19] A union's lack of activity is one factor that must be evaluated in determining whether a company has a reasonably based doubt of a union's majority. *Taft Broadcasting,* 201 NLRB 801. However, in the instant case there is no showing that the filing of grievances was warranted, and there is no showing that the Union failed to actively represent the employees in the past. Cannon testified that sometime be-

19. Cannon also said that there never had been any correspondence as far as an election was concerned. As is set forth above, the presumption of majority can be based on either certification or voluntary recognition.

tween the end of July and early October 1974, he asked Supervisors McHatton and Schlegel if there had been any union activity around and McHatton told him there had been people in there. Apart from that testimony and Cannon's assertion that no grievances had been filed, there is no evidence that Cannon believed that the Union had been inactive in the past or that the Union's activity during the summer of 1974 was substantially different than it had been before.[20]

In the first part of August 1974, Cannon spoke to Kelley and Miltonberger about the turnover rate of its employees. The rate was about 4 to 1 a year, with four employees being hired for every one that remained per year. Cannon said that he didn't think the Union had a controlling membership because of the amount of personnel turnover. At the meeting of September 16, 1974, at which the decision to question the Union's majority was made, Cannon told the other officials of Respondent that the turnover was so great that he could not see how the employees would bring in a vote for the Union. High turnover is one circumstance among others that must be considered. *People's Gas System, Inc., supra; Convair Division of General Dynamics, supra; Kentucky News, Inc.,* 165 NLRB 777. However, high employee turnover in itself is insufficient to establish a reasonable doubt as to a union's majority, and the Board has repeatedly held that new employees will be presumed to support the Union in the same ratio as those they may replace. *Strange and Lindsey, Inc.,* 219 NLRB No. 190;

20. McHatton testified that he couldn't "recollect" whether he had seen Union business agents on the premises for business purposes before September 1974. Schlegel testified that when he worked at Respondent's premises between May and December 1974, he saw one union representative in September. That testimony does not establish a lack of union activity. In addition, there is no evidence that those supervisors communicated such information to Cannon.

King Radio Corporation, 208 NLRB 578, enf. 510 F.2d 1154 (C.A. 10, 1975).

Cannon knew that some of the employees were dissatisfied with the Union. Waitress Tucker told Cannon that she had never belonged to the Union and that she couldn't see where the Union could do anything. Tucker made a similar remark to McHatton which was passed on to Cannon. McHatton also passed on to Cannon the remark by employee Wilmurth that Wilmurth didn't see what good the Union was going to do.[21] In addition, McHatton told mangement officials about bits and pieces of conversations he heard from other employees, the names of whom he could not recall, concerning the Union going broke, the Union not having enough organized people and their feeling that the Union could not do anything for them. Schlegel told Cannon that he overheard casino cashier Drew say that she didn't care for union activities and she couldn't understand what the Union could do for her. Drew was not within the bar and culinary employees bargaining unit. Respondent's evidence thus establishes that Cannon had reason to believe that three named employees, one of whom was not a member of the bargaining unit in question, had expressed disapproval of the Union. In addition, he was informed that bits and pieces of overheard conversations by an undisclosed number of other employees, also indicated dissatisfaction. There were between 35 and 52 employees in the bar and culinary employees unit. The evidence adduced by Respondent falls far short of establishing that a majority of the employees in the bargaining unit expressed displeasure with the Union. The number of employees who expressed displeasure with the Union was insubstantial with relation to the overall

21. It is noted that Wilmurth applied for membership in the Union and paid his initiation fees and dues.

employee complement in the unit and Respondent could not base a reasonable doubt of majority on such a limited number of remarks. Cf. *Strange and Lindsey Beverages, Inc., supra.*

In *United Supermarkets, Inc.*, 214 NLRB No. 142, the Board held that an employer did not have a reasonable doubt based on objective facts as to the Union's continuing majority status. The Board held:

> A showing of such doubt requires more than an employer's mere assertion of it, and more than proof of the employer's subjective frame of mind. The assertion must be supported by objective considerations, that is, some substantial and reasonable grounds for believing the Union has lost its majority status. [Footnotes omitted.]

After considering all of the factors set forth above, I conclude that Respondent did not have substantial and reasonable grounds for believing the Union had lost its majority status. Respondent's assertion in that regard was based on subjective rather than objective considerations.[22] In sum, I find that the presumption of continued majority has not been rebutted either by a showing that the Union in fact lost its majority status or by a showing that Respondent had a sufficient objective basis for reasonably doubting the Union's continued majority. I find that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in Section III, above, occurring in connection with the operations of Respondent described in Section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

22. Cannon's remark that turnover was so great that he could not see how the employees would bring in a vote for the Union was merely one example of Respondent's subjective approach.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Sections 8(a)(5) and (1) of the Act by unlawfully withdrawing recognition from the Union and by refusing to bargain with the Union as the exclusive representative of its employees in the aforesaid appropriate unit, I recommend that Respondent be ordered to recognize and, upon request, to bargain in good faith with the Union as the exclusive representative of its employees in that unit.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the policies of the Act for the Board to assert jurisdiction.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by the Respondent in its bar and culinary operations at its Crystal Bay, Nevada, operations, excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. By withdrawing recognition from the Union and by refusing to bargain with the Union, Respondent has engaged in unfair labor practices within with meaning of Section 8(a)(5) of the Act.

6. By the foregoing conduct, Respondent has interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[23]

ORDER

Respondent, Tahoe Nuggett, Inc. d/b/a Jim Kelley's Tahoe Nugget, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders

23. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided, in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

International Union, AFL-CIO, as the exclusive representative of its employees in the following bargaining unit:

> All employees employed by it in its bar and culinary operations at its Crystal Bay, Nevada, operations, excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive representative of its employees in the unit described above.

(b) Post at its Crystal Bay, Nevada, facility copies of the attached notice marked, "Appendix."[24] Copies of the notice on forms provided by the Regional Director for Region 20, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 (sixty) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 20, in writ-

24. In the event the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD," shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

ing, within 20 (twenty) days from the date of this Order what steps it has taken to comply herewith.

Dated: January 28, 1976.

Richard D. Taplitz
Administrative Law Judge

Appendix

Form NLRB-4727
(9-69)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

We hereby notify you that:

WE WILL NOT refuse to recognize and bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive representative of our employees in the following bargaining unit:

> All employees employed by us in our bar and culinary operations at our Crystal Bay, Nevada, operations, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL recognize and, upon request, bargain in good faith with said Union as the exclusive representative of our employees in that unit.

Tahoe Nuggett, Inc. d/b/a
Jim Kelley's Tahoe Nugget
(Employer)

Dated ..... By .....
(Representative) (Title)

This Is an Official Notice and Must Not Be Defaced by Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building Box 36047, 450 Golden Gate Avenue, San Francisco, California, 94102. Telephone Number: (415) 556-6721.

Appendix D(1)

227 NLRB No. 73

MJW
D—1504
Crystal Bay, Nev.

United States of America
Before the National Labor Relations Board

Nevada Lodge
and
Hotel-Motel-Restaurant
Employees & Bartenders Union, Local 86,
Hotel & Restaurant Employees & Bartenders
International Union, AFL-CIO
Received Dec 20 1976
Severson, Werson, Berke & Melchior

Cases 20—CA—9648 and
20—CA—9847

DECISION AND ORDER

On March 8, 1976, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. General Counsel and the Charging Party filed briefs in support of the Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board

adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Nevada Lodge, Crystal Bay, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. December 16, 1976

Betty Southard Murphy, Chairman
Howard Jenkins, Jr., Member
National Labor Relations Board

(Seal)

---

1. Respondent's request for oral argument is hereby denied, as the record and the briefs adequately present the issues and the positions of the parties.

Respondent has moved to strike the Charging Party's brief on the ground that the brief makes certain assertions which are misleading and unfounded in fact. We consider Respondent's motion to be without merit and hereby deny it.

2. The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

3. For the reasons enunciated in our decision in *Tahoe Nugget, Inc.*, 227 NLRB No. 72 (1976) we agree with the Administrative Law Judge that the presumption of majority status flowing from the contract in the multiemployer unit survives Respondent's timely withdrawal from that unit and carries over to the newly created single-employer unit.

Respondent has excepted to the Board's asserting jurisdiction in this proceeding. It argues that the Board's assertion of jurisdiction over the gaming industry is arbitrary and capricious when compared to the Board's refusal to assert jurisdiction over the horseracing and dogracing industries. The Board has in previous cases considered and rejected arguments identical to those now raised by Respondent. *El Dorado Inc. d/b/a El Dorado Club*, 151 NLRB 579 (1965); *The Anthony Company d/b/a El Dorado Club*, 220 NLRB No. 152 (1975). We adhere to our approach in those cases and accordingly affirm the Administrative Law Judge's decision asserting jurisdiction over Respondent.

Member Walther, dissenting:

For the reasons enunciated by me in my dissenting opinion in *Tahoe Nugget, Inc.*, 225 NLRB No. 112 [sic], I dissent from my colleague's conclusion that the presumption of majority status flowing from the contract in the multiemployer unit survives Respondent's timely withdrawal from that unit and carries over to the newly created single-employer unit. Accordingly, in the absence of proof of majority standing, I would dismiss the complaint.

Dated, Washington, D.C. December 16, 1976

Peter D. Walther, Member
National Labor Relations Board

Appendix D(2)

JD-(SF)-56-76
Crystal Bay, Nev.

United States of America
Before the National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California

Cases Nos. 20-CA-9648
20-CA-9847

Nevada Lodge
and
Hotel-Motel-Restaurant Employees &
Bartenders Union, Local 86,
Hotel & Restaurant Employees & Bartenders
International Union, AFL-CIO

Stuart R. Dvorin and *Eileen H. Hamamura, Attys.*,
of San Francisco, Calif., for the General Counsel.
Severson, Werson, Berke & Melchior
by *William W. Wertz, Atty.*, of San Francisco, Calif.,
for Respondent.
Davis, Cowell & Bowe by *Richard G. McCracken, Atty.*,
of San Francisco, Calif., for the Charging Party.

DECISION

Statement of the Case

Richard D. Taplitz, Administrative Law Judge: This case was tried in South Lake Tahoe, California, on October 21 and 22, 1975. The charge, and the first, second, third, fourth and fifth amended charges in Case No. 20-CA-9648 were filed on October 16, November 13 and 18, December 26,

1974, February 27 and June 2, 1975, respectively, by Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, herein called the Union. The charge in Case No. 20-CA-9847 was filed by the Union on January 9, 1975. The complaint, which issued on August 13, 1975 and was amended at the hearing, alleges that Nevada Lodge, herein called Respondent, violated Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended.

Issues

The primary issues are:

1. Whether Respondent violated Section 8(a)(1) of the Act by announcing and granting increases in pay and employee benefits in order to induce employees to abandon their support for the Union.

2. Whether Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union as the collective-bargaining representative of its bar and culinary employees. Subsidiary issues with regard to that allegation are:

(a) Whether the rebuttable presumption of the Union's continued majority status which flowed from a contract in a multiemployer bargaining unit survived Respondent's timely withdrawal from that unit and was applicable to a single-employer bargaining unit.

(b) If the presumption did apply, whether Respondent has rebutted that presumption by affirmatively establishing that the Union had, in fact, lost its majority or by showing that Respondent had sufficient objective bases for reasonably doubting the Union's continued majority.

A further issue is whether the Respondent has engaged in any conduct tending to encourage employee disaffection from the Union.

3. Whether Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally instituting a dental insurance plan without prior notification to or consultation with the Union.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, Respondent and the Charging Party.

Upon the entire record of the case and my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent is a corporation engaged in the operation of a restaurant, hotel and gaming casino at Crystal Bay, Nevada. During the past calendar year Respondent's gross revenues were in excess of $500,000, and during that year Respondent purchased and received goods valued in excess of $10,000 which originated outside of Nevada.

Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the policies of the Act for the Board to assert jurisdiction. See *The Anthony Company d/b/a El Dorado Club,* 220 NLRB No. 152 and cases cited therein.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Background*

The Reno Employers Council, herein called the Association, is a Nevada corporation with an office in Reno,

Nevada. It is a voluntary association of employers engaged in the casino, restaurant and other industries. The Association exists, in part, for the purpose of representing its member-employers in collective bargaining and in administering collective-bargaining agreements with various labor organzations, including the Union. The Union and the Association entered into a multiemployer collective-bargaining contract on August 3, 1959. The Association agreed to the contract on behalf of employers it represented in the Lake Tahoe area.[1] Succeeding contracts followed,[2] with the last effective from December 1, 1971 through November 30, 1974.[3] That contract was between the Union and the Association on behalf of the individual members thereof signatory thereto. Five employers were signatory to the contract, including Respondent.[4] The employees covered by that contract were those in the employers' bar and culinary operations at Lake Tahoe.

Respondent purchased its facility, which had formerly been operated as the Tahoe Biltmore, in November 1957. The establishment was then closed for substantial reconstruction. It opened in July 1958 with all new employees.

The Tahoe Biltmore had a single-employer collective-bargaining agreement with the Union that was effective by its terms until September 4, 1957. That contract covered

---

1. Local 45, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO was also party to that contract. Subsequently, Local 45 merged into Local 86, the Union herein.

2. In some of those contracts new member-employers of the Association were added and other employers were deleted.

3. Nevada is a right-to-work state and none of the contracts contained a union-security clause.

4. The signatory employers were Barney's Club, Harvey's Resort Hotel, Respondent, Sahara-Tahoe and Tahoe Nugget.

employees of the Tahoe Biltmore who came under the jurisdiction of the Union. The complaint does not allege nor did the General Counsel prove that Respondent is a successor-employer who would be bound by the Tahoe Biltmore's collective-bargaining relationship with the Union. However, Respondent joined the Association and became a party to the multiemployer bargaining agreement that was executed on December 4, 1960.[5] Respondent continued to be a party to the successive contracts through the one that expired on November 30, 1974.

On September 17, 1974, Respondent timely withdrew its membership from the Association.[6] On October 25, 1974, Respondent refused to bargain with the Union, and Respondent has withdrawn recognition from the Union. On July 25, 1975, Respondent filed a petition for an election with the Board. That petition sought an election among Respondent's culinary and bartender employees in a single-employer unit. The complaint alleges a refusal to bargain in that single-employer unit. The complaint alleges, the answer admits, and I find that the appropriate bargaining unit is:

> All employees employed by the Respondent in its bar and culinary operations at its Crystal Bay, Nevada operations, excluding all other employees, guards and supervisors as defined in the Act.

In September 1974 Respondent announced and granted across-the-board wage increases for its cooks, waitresses

5. Respondent's General Manager Carlton Konarske testified that to his knowledge there was no contract when Respondent opened in 1958. He also testified that shortly after the opening Respondent agreed to recognize the Union, but that he did not know whether that was before or after Respondent joined the Association.

6. The General Counsel concedes in its complaint that the withdrawal was timely.

and busboys, all of whom were employed in the bargaining unit. The wage increases were announced and granted without prior notification to or consultation with the Union. Respondent contends that the increases were lawful pursuant to the then outstanding collective-bargaining contract which stated in part:

> *Article I, Section 6. Employer May Increase Benefits, Privileges and Wages Without Prejudice.*
>
> The employer is granted the right to increase any privileges, benefits or wages provided for by this Agreement. In the event the Employer does increase any such benefits, wages or privileges he may, without prejudice, reduce said benefits, wages or privileges at any time he may choose to do so, provided that, under no circumstances, will any employee covered thereunder be paid, or given less than the minimum benefits, wages and privileges provided for herein.

The complaint does not allege nor does the General Counsel contend that the increase in wages violated Section 8(a)(5) of the Act. It is contended, however, that the increase was unlawful in that it was announced and granted in order to induce employees to abandon their support for the Union. After the Respondent withdrew recognition from the Union and after the contract expired, Respondent announced and granted a number of employee benefits, which are set forth in detail below. The General Counsel contends that all of those benefits were intended to undermine the Union in violation of Section 8(a)(1) of the Act. Also, after the expiration of the contract, Respondent instituted a dental insurance plan without notification to or consultation with the Union. The General Counsel alleges that that action violated Section 8(a)(5) of the Act.

B. *The Refusal to Bargain*

1. The facts

a. *The testimony of Staff*

Alfred E. Staff is the bar manager for the Overland Hotel in Reno. From early July 1973 to June 7, 1974, when the Union was placed under trusteeship, Staff was president of the Union.[7] During that time Staff, in addition to being union president, was a full-time bartender. The only full-time paid union officer was Secretary-Treasurer and Business Manager E. W. Tucker. Staff testified that a number of events occurred during the summer of 1974. However, it is apparent that those events took place before the trusteeship and the sequence of events set forth below is keyed to the June 7 trusteeship date. Otherwise, the following findings are based on Staff's credited testimony.

In June 1974, the Union had about $11,000 in its treasury and that amount was decreasing. However, the Union's liabilities did not exceed its assets. The Union had approximately 1,000 members, of whom between 700 and 800 were paid up in their dues.[8] In the spring of 1974, the Union sent Business Manager Tucker to the headquarters of the International in Cincinnati to see if he could obtain money to help the Union organize. The executive committee of the Union had discussed the need to obtain more members and to build the membership up to a point where the Union could have some strength when it met with the employers to negotiate the next contract. Tucker went to Cincinnati and discussed the matter with representatives of the International. He then returned and reported to the executive committee that the International would give the Union money to organize if the officers resigned, the Union went into trusteeship, and the International administered the Union. The executive committee decided to let the International take over. The matter was brought up at the next regular meeting of the Union, and a majority of the membership voted to accept the trusteeship. The officers resigned and the trusteeship was imposed on June 7, 1974. Al Bramlet was appointed International trustee.

During the summer of 1974, Tucker told Staff that there were about 30,000 employees in the Lake Tahoe and Reno areas who were employed in categories over which the Union had jurisdiction.

Conversations with Tucker and Staff's review of membership records led Staff to believe that of the approximately 900 or 1,000 union members in May 1974, about 20 percent of them were in the Lake Tahoe area and the balance were in Reno. Staff appeared confused in his testimony with regard to the distinction between union members and employees represented by the Union. His testimony read as a whole clearly indicates that when he was referring to the approximately 900 or 1,000 employees and to the 20 percent figure, he was referring to members and not to all employees who were represented through coverage by outstanding contracts.

In the spring of 1974, the Union placed announcements in local newspapers stating that the Union would hold a meeting to discuss with employees what it would ask in contract negotiations and to see if it could get more people interested in an expansion of the Union. The employees

7. Staff was unsure on his dates. He averred that he believed the trusteeship was imposed in August, but that it might have been in June. Howard Lawrence, a business representative who is the chief executive officer of the Union in the Lake Tahoe area, testified that the trusteeship was imposed on June 7, 1974. I credit Lawrence.

8. At another point in his testimony, Staff averred that there were about 700 to 750 paid up members and in addition there were about 150 other people who were on the membership rolls who were not paid up, but who were not suspended. The highest number of members during Staff's term of office was about 1200.

invited were those in the Lake Tahoe area. No employees showed up for the scheduled meeting and it was not held.

During the time that he was president, Staff spoke to some union bartenders that he worked with at the Overland Hotel in Reno and he received comments from them to the effect that they were discouraged with the Union, that the Union didn't do anything for them, and that they did not like the way the Union was being run. Some bartenders said: "When is the Union going to be able to do anything for us," "They never do nothing for us," "What's the sense of joining a Union." He never received any compliments on the performance of the Union. In addition to talking to bartenders at the Overland Hotel, he spoke to some culinary workers at various clubs in the Reno area in an attempt to organize them. However, there is no evidence in the record that any employee of Respondent expressed dissatisfaction with the Union to Staff.

Staff did not communicate any of the matters related above to Respondent and there is no indication in the record that Respondent knew of the substance of those matters at the time that it refused to bargain with the Union.

Apparently Respondent is relying on Staff's testimony solely for the purpose of attempting to prove that the Union, in fact, did not have majority status.[9] With regard to the matters set forth below, Respondent contends that it did have a reasonably based doubt as to the Union's majority, upon which it acted in withdrawing recognition.

---

9. As the Board held in *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho, and its Employer-Members*, 213 NLRB No. 74, an employer's reasonably based doubt of a union's majority status must be predicated on information it had at the time of its refusal to bargain. See, also, *Orion Corp.*, 210 NLRB 633, enfd. 515 F.2d 81 (C.A. 7, 1975).

b. *Remarks by employees of Respondent, conversations between supervisors, and the newspaper articles*

In early September 1974, when Respondent was reviewing its turnover rates with a view toward questioning the Union's majority status, Respondent employed 165 or more[10] employees in the bar and culinary unit. The decision to question the Union's majority status was made by Respondent's General Manager Carlton K. Konarske. Konarske received certain direct and indirect reports concerning the attitude of some of the employees in that unit toward the Union.

In early August 1974, waitress Leona Gau told Konarske that she had no interest in the Union and that most of the girls were not interested in belonging to the Union. In a second conversation a short time later, Gau told Konarske that there was going to be a union meeting and that, though she was not interested in going, she was curious. Within the next week or two, Konarske saw three or four employees wearing union pins. About that time Gau told Konarske that she objected to the Union's forcing the pins on employees and that she objected to the Union's trying to induce busboys to join the Union because the busboys were going to college and wouldn't be there very long. She also told Konarske that she had no intention of supporting the Union.[11]

---

10. At one point in his testimony Konarske testified that there were about 165 culinary workers and 26 or 27 cocktail waitresses, barboys or bartenders. Later he indicated that there were about 165 employees in the entire unit.

11. These findings are based on the uncontradicted testimony of Konarske. Union records show that Gau joined the Union on September 9, 1974, and paid her dues for October. They also show that she paid $3.50 on September 14, 1974, for a union pin. However, those facts do not warrant the discrediting of Konarske. Gau did not testify and it may well be that Gau told Konarske what she thought Konarske wanted to hear even though she was in favor of the Union.

In late August or early September, pantryman Louis Ronzo told Konarske that the Company should not be concerned about the Union because the Union got little support from the cooks. He also told Konarske that he (Ronzo) had no respect for the Union, that the Union didn't do the cooks any good, and that they were satisfied and pleased with working conditions as established by management.[12]

In August 1974, cocktail waitress Ellen Dungan told Konarske that he did not have to worry about the cocktail waitresses and busboys because, with one exception, none of them were concerned about the Union. She said that they didn't feel that the Union was necessary for their welfare and that she did not want to pay dues to the Union.

Konarske testified that in late August 1974 he spoke to bartender Max DeCaminada, who told him that he was not interested in the Union and was not going to join. At the time of the trial DeCaminada was still working for Respondent. DeCaminada paid a reinstatement fee of $35 to the Union on June 27, 1974, and continued to pay his dues through January 1975. DeCaminada testified that he had no conversation with Konarske concerning the Union in 1974. DeCaminada, while he was testifying, impressed me as a fully credible witness. His testimony was consistent with the fact that he was a dues paying member of the Union. As between Konarske and DeCaminada I credit DeCaminada.

On September 21, 1974, Konarske received a report that a union representative was in the kitchen. He went to the

12. These findings are based on the credited testimony of Konarske. Union records establish that Ronzo was a union member and paid his dues from 1970 until he died in October 1974. While the matters in those records shed some doub on Konarske's credibility, once again this may be a situation where an employee was attempting to curry favor with his employer.

kitchen and asked Union Representative Bob Hart what he was doing there. Hart replied that he had been speaking to baker William Schu. Konarske told Hart that Hart was not allowed in that area without permission and Hart left. Konarske then spoke to Schu in the presence of another baker, Paul Harbaugh. Schu told Konarske that the Union had no right to come back there and that he wished the Company would keep "these pests" out of there. Schu also said that he was not interested in the Union and he was getting fed up with them. Harbaugh said that he was satisfied with every condition there and he did not want the Union back there bothering his department. Harbaugh also said that there was no advantage to belonging to the Union.[13]

Near the end of September 1974, cook Jim Curreo told Konarske that the Company did not have to worry about the cooks supporting the Union and that almost everybody was against the Union. He also told Konarske that they were satisfied with management's working conditions.

In addition to receiving reports from the employees mentioned above, Konarske had conversations with two supervisors concerning the Union. They were Bar Manager Dutch Connor and Hotel and Food Manager Ross Henderson.[14]

13. These findings are based on the credited uncontradicted testimony of Konarske. Neither Schu nor Harbaugh testified. Union records show that Harbaugh joined the Union on June 26, 1974, and paid his dues for July through October 1974. He was suspended in December 1974. For the reasons set forth above, I do not believe that the matters set forth in the union records warrant the discrediting of Konarske.

14. At all times material herein Henderson was hotel manager. Henderson testified that he was given the additional title of food manager in September 1974. Konarske testified that the additional title was given October 1, 1974.

In August 1974, Konarske asked Connor what the status was of the employees under his jurisdiction at the bar. Connor replied that there was no problem among the cocktail waitresses or busboys, but that he was uncertain whether or not the bartenders would support the Union.

In mid-September 1974, Konarske asked Henderson whether Henderson knew about the Union and the help downstairs. Henderson replied that he didn't think they had a thing to worry about and that the girls were not supporting the Union at all. Henderson reported to Konarske a conversation that he (Henderson) had with Executive Chef Dave Rightman[15] in which Rightman said that there would be no problem with the Union with relation to the girls and busboys and that there would be no support for the Union from them.[16] Henderson had several conversations with Konarske in which he (Henderson) said that it was his opinion that the Union lacked support in the culinary workers unit and that there was a lack of interest in the Union.

In early July 1974, Konarske read an article in the Nevada State Journal or the Reno Gazette which indicated that the Union was having financial difficulties, that it was undergoing a trusteeship and that Al Bramlet was being put in charge. Sometime in the summer of 1974, he read another article in a Reno paper concerning the Union reorganizing. In July 1974, he heard a report on the radio

15. Rightman had authority to hire and fire employees and he was a supervisor within the meaning of the Act.

16. These findings are based on the credited testimony of Konarske. Henderson credibly testified that Rightman told him that there was very little interest shown in union activity and that a flyer had come around advertising a union meeting, which had ended up in the wastebasket. Henderson did not mention the flyer to Konarske. Rightman has nothing to do with the bar and he was speaking to Henderson only about coffeeshop employees.

to the effect that the Union was having financial difficulties, that it was going to be placed into trusteeship by the International and that Al Bramlet was going to be the trustee.[17]

c. *The decision to withdraw recognition*

Respondent acknowledges that on or about October 25, 1974, it refused to bargain with the Union and that it has withdrawn recognition from the Union. Respondent contends that at the time it refused to bargain it had sufficient objective basis for reasonably doubting the Union's continued majority.

The remarks of certain employees concerning their attitude toward the Union and various conversations between supervisors relating to the employees' attitudes are discussed above. Also, as indicated above, Konarske obtained information concerning the Union's trusteeship and the financial difficulties of the Union. In addition, Konarske knew that Nevada is a right-to-work state. He also knew that an election had never been held in the bar and culinary unit.

Konarske testified that in early September 1974 he reviewed the Company's turnover rate for employees in the bar and culinary unit and came to the conclusion that the rate was about 100 percent per year. He averred that that was an educated guess and that later he was of the opinion that the rate was even higher. At the time there were 165 or more employees in the unit. He testified that the percentage of turnover was less in the bar area, which was

17. Union Executive Officer Howard Lawrence credibly testified that the Union was solvent and able to pay its bills, that the International felt that additional organizing efforts had to be made, that additional sums of money had to be put in, that the money would come from the International, that the International wished to retain control of that money, and that the money was given on condition that there be a trusteeship.

more stable. Konarske was very vague with regard to the method he used to evaluate the turnover rate, but I credit his assertion that the turnover rate was very substantial.

Konarske credibly testified that to his knowledge there had been no grievances filed from 1958, when Respondent opened the premises, until after October 25, 1974, when Respondent refused to bargain, and that he never received any oral grievances. He also credibly testified that he was familiar with the collective-bargaining contracts, that he operated the business in conformity with those contracts, and that he never consciously violated them. He also averred that no violations were ever brought to his attention.

In mid-June 1974, Howard Lawrence, the Union's executive officer for the Lake Tahoe area, visited Respondent's premises and spoke to employees. He was told that seven employees were scheduled to be terminated because of a company rule that prohibited relatives from working together. The following day he held a meeting with 15 or 18 employees at the Carpenters Hall in Kings Beach and the proposed terminations were discussed. On June 18 or 19, 1974, he met with Executive Chef Dave Rightman at Respondent's premises and he protested the discharges. Rightman made a phone call and then agreed to rehire five of the seven employees.

During Lawrence's meeting with the employees there were complaints from employees that the 10-minute breaks and half-hour lunches were not being provided. Lawrence gave them a grievance form which was signed by employees. The grievance form was sent to the Nevada Labor Commission and the matter was later resolved.

The only written grievance filed by the Union related to the discharge of two employees, Alicia Faulkner and Brenda Randall. That grievance was filed on November 15, 1974. Lawrence discussed the matter with Konarske. Later Lawrence received a letter dated November 23, 1974, from Respondent's Hotel Manager Henderson, advising him that Clinton Knoll of the Association would contact him with regard to a board of adjustment hearing.[18]

It appears that the Union did not process any formal or informal grievances from the time Respondent opened the premises in 1958 until about June 18 or 19, when Lawrence contacted Executive Chef Dave Rightman concerning the seven discharges. However, there is no evidence that the Union abandoned the bargaining unit or failed to represent the unit employees during that period. Konarske knew of the outstanding collective-bargaining contracts and was unaware of any violations. There is no indication that the Union was aware of any company practices that violated the contract. Konarske credibly testified that through the years he met several business agents at Respondent's premises. Though he also testified he did not meet them very often, they were apparently there at times. In June 1974, Lawrence was at the premises speaking to employees and later in the month he was there protesting certain discharges to Respondent's Executive Chef Rightman. On September 21, 1974, Konarske saw Union Representative Bob Hart on the premises. At all times through November 30, 1974, the collective-bargaining contract was in effect.

Respondent withdrew from the Association on September 17, 1974. Konarske testified that Respondent became a single employer rather than remain in the multiemployer bargaining unit because he did not believe the Union continued to represent a majority of Respondent's employees and if Respondent continued in the Association, there might

18. The letter was dated November 23, 1974. It is noted that Respondent withdrew from the Association on or about September 17, 1974.

be some groups that would sustain the Union's majority. He further averred that it would not be to Respondent's advantage to stay in the Association. Shortly before or after September 17, 1974, Respondent retained an attorney and, according to the testimony of Konarske, the attorney "was to use any necessary method to get us disassociated with the Union."

d. *The Union's demand for negotiations, Respondent's refusal and the petition for an election*

The last contract expired by its terms on November 30, 1974. By letter dated July 22, 1974, Union International Trustee Al Bramlet notified Respondent of his desire to modify and change the contract and sought to arrange for collective-bargaining negotiations. On September 17, 1974, Respondent withdrew from the Association and on the same date Meta K. Fitzgerald, one of the owners of Respondent, wrote to the Union enclosing a copy of a letter it had sent to the Association and notifying the Union that Respondent terminated the collective-bargaining agreement as of the end of the term thereof. On September 27, 1974, Philip Bowe, the Union's attorney, wrote to Respondent acknowledging receipt of the September 17, 1974 letter (which notified the Union of Respondent's withdrawal from the Association) and requesting that Respondent immediately contact Bramlet to discuss a convenient time and place for negotiations. By a letter to the Union dated October 10, 1974, Respondent, through Meta Fitzgerald, stated that Respondent had never dealt with Bowe or Bramlet and asked what Bramlet's relation to the Union was. By letter dated October 15, 1974, Bowe explained to Respondent that Bramlet was the International trustee and that Tucker, who had been secretary-treasurer of the Union, was now

Bramlet's assistant. By letter dated October 18, 1974, Bowe demanded that Respondent begin negotiations. By letter dated October 25, 1974, Respondent's Attorney Nathan Berke reminded the Union that Respondent had timely withdrawn from the multiemployer unit and was handling its own collective bargaining. The letter went on to state:

> If the ambiguity in Mr. Bowe's letter is considered a request to bargain in a single employer unit, then at the instructions of our client, we inform you that our client has a genuine doubt that your Local represents an uncoerced majority of its employees in an appropriate unit. If following a validly conducted election in an appropriate unit under the aegis of the National Labor Relations Board, your Local should be selected as the bargaining agent, our client will at such time fulfill whatever legal obligation it may then have.
>
> Should you file a petition with the Board for an election, our client will cooperate looking toward an election in accordance with the Labor-Management Relations Act, as amended and the Board's applicable rules and regulations.

The Union filed a first amended unfair labor practice charge on November 13, 1974, in which it alleged that Respondent unlawfully refused to bargain with it.

Respondent admits that commencing on or about October 25, 1974, it has refused to bargain collectively with the Union and has withdrawn recognition from the Union.

On July 25, 1975, which was about 9 months after the refusal to bargain and about 8 months after the filing of the refusal to bargain charge, Respondent filed a petition for an election with the Board. The petition was blocked by the unfair labor practice charge and was thereafter dismissed.

2. Analysis and conclusions with regard to the refusal to bargain[19]

a. *The presumption of majority*

As the Board held in *Walter E. Heyman d/b/a Stanwood Thriftmart,* 216 NLRB No. 154:

> A contract, lawful on its face, raises a presumption that the contracting union was the majority representative at the time the contract was executed, during the life of the contract, and thereafter.[2]

2. *Shamrock Dairy, Inc.,* 119 NLRB 998, 1002 (1957), and 124 NLRB 494, 495-496 (1959), enfd. 280 F.2d 665 (C.A.D.C), cert. denied 364 U.S. 892 (1960).

In the instant case, the presumption of continued majority status is based on a contract in a multiemployer bargaining unit. The complaint alleges a refusal to bargain in a single-employer bargaining unit. A serious question is presented whether the presumption of continued majority which flowed from the existence of the multiemployer contract survived the withdrawal of Respondent from the multiemployer unit and can be applied to the newly created single-employer unit. There has never been any contract between Respondent and the Union in the single-employer unit and, therefore, any presumption of majority must flow from Respondent's inclusion in the multiemployer contract that expired on November 30, 1974.

In *Downtown Bakery Corp.,* 139 NLRB 1352, enf. den. in pert. part 330 F.2d 921 (C.A. 6, 1964), a successor employer

19. Much of the legal analysis set forth below is the same as that which is contained in my decisions in *Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel,* JD-(SF)-9-76 (issued January 21, 1976), *Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget,* JD-(SF)-19-76 (issued January 28, 1976), and *Barney's Club, Incorporated,* JD-(SF)-35-76 (issued February 20, 1976), cases that involved many of the same legal principles.

refused to bargain with a union where that union was the Board-certified representative of the employees in a multi-employer bargaining unit which included a predecessor employer. In that case the predecessor employer had signed a separate collective-bargaining agreement with the union. Relying on a presumption of continued majority, the Board found that the successor employer violated Section 8(a)(5) of the Act by refusing to bargain with the union in the single-employer unit. The Sixth Circuit Court of Appeals refused to enforce the Board's bargaining order, holding in part that there was not sufficient evidence in the record to support a finding of majority status of the union.

In *The Richard W. Kaase Company,* 141 NLRB 245, enf. den. in pert. part 346 F.2d 24 (C.A. 6, 1965), a similar factual pattern was presented, and the Board followed its *Downtown Bakery Corp.* precedent. In *The Richard W. Kaase Company* case, a union was certified as the collective-bargaining agent of the employees of employers in a multi-employer bargaining unit which included a predecessor employer. That employer executed a separate collective-bargaining agreement. Thereafter, a successor employer continued to recognize the predecessor's contract but later withdrew recognition. The Board found that the successor violated Section 8(a)(5) of the Act. The Sixth Circuit Court of Appeals once again refused to enforce the Board's order, holding: "the ambiguity inherent in the multiemployer election here relied on vitiates its efficacy to prove a majority as to any single employer."

The Board law established by the *Downtown Bakery* and *Richard W. Kaase Company* cases is not directly applicable to the instant situation. In each of those cases, the individual employer had signed separate collective-bargaining contracts with the union, and the presumption of continued

majority could flow from those contracts rather than from the multiemployer certification. In the instant case, the initial collective-bargaining contract was in a multiemployer bargaining unit and the succeeding contracts to which Respondent was a party were multiemployer bargaining contracts.[20] However, I believe that the presumption of continued majority flowing from the multiemployer contracts requires a derivative presumption of the Union's majority status which is applicable to each of the employer-members of the multiemployer bargaining unit separately. Unless a majority of an employer's employees desire representation by a union, that employer may not lawfully force representation on them by joining a multiemployer bargaining arrangement. *Mowhawk Business Machines Corporation*, 116 NLRB 248; *Dancker & Sellew, Inc.*, 140 NLRB 824, enf. 330 F.2d 46 (C.A. 2, 1964). Thus, Respondent would have violated the Act in 1960 when it became party to the multiemployer collective-bargaining agreement if a majority of its employees did not desire representation. Any unfair labor practice charge relating to such a violation would have had to have been filed within 6 months from that time. Respondent may not now either attack the initial bargaining relation or use it to establish a defense to a refusal to bargain complaint. As the Board held in *North Bros. Ford, Inc.*, 220 NLRB No. 154:[21]

> Section 10(b) of the Act confines the issuance of unfair labor practice complaints to events occurring during the 6 months immediately preceding the filing of a charge and has been interpreted by the Supreme Court to bar finding any unfair labor practice, even though committed within that period, which turns on whether or not events outside that period violated the Act. *Bryan Manufacturing Co.*[3] The Court, holding that maintenance and enforcement of a contract more than 6 months after recognition of a minority union did not violate the Act, relied in part on the legislative history indicating that Congress specifically intended Section 10(b) to apply to agreements with minority unions in order to stabilize bargaining relations. Noting that labor legislation traditionally entails compromise, the Court observed
>
> > that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in "industrial peace which it is the overall purpose of the Act to secure."[4]
>
> The Board, in light of *Bryan*, has since held that Section 10(b) is applicable to a refusal-to-bargain defense that the bargaining relation was unlawfully established.[5]

20. It is also noted that, unlike the instant situation, both those cases involved conflicting representational claims by rival unions.

21. See also *Walter E. Heyman d/b/a Stanwood Thriftmart, supra.*

3. *Local Lodge No. 1424, IAM, AFL-CIO* [*Bryan Manufacturing Co.*] *v. N.L.R.B.*, 362 U.S. 411 (1960).

4. *Id.* at 428, citations omitted.

5. *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970), enforcement denied on other grounds *sub nom., Tragniew, Inc., and Consolidated Hotels of California v. N.L.R.B.*, 470 F.2d 669 (C.A. 9, 1972); *Roman Stone Construction Company, and Kindred Concrete Products, Inc.*, 153 NLRB 659, footnote 3 (1965).

Respondent may not, at this late date, attack either the initial recognition of the Union by Respondent or the initial contract. It cannot defend against the refusal-to-bargain

complaint on the ground that the original contract was entered into at a time when the Union did not represent a majority of the employees of Respondent. Nor can it defend on the ground that the Union did not represent a majority of the employees in the overall multiemployer bargaining unit. That contract must be considered valid on both those grounds. The presumption of majority status which continued over the years based on successive contracts applies both as to the employees of Respondent and to the employees in the multiemployer unit. I therefore find that the General Counsel has properly relied on that presumption to establish the Union's majority in the unit in question. It remains to be considered whether Respondent has successfully rebutted that presumption.

b. *The attempt to rebut the presumption*

(1) The background law

In *James W. Whitfield d/b/a Cutten Supermarket,* 220 NLRB No. 64, the Board summarized the existing law, holding:

> It is well settled that Section 8(a)(5) and Section 8(d) of the Act require an employer to recognize and bargain in good faith with the bargaining representative selected by a majority of its employees. That recognition establishes a presumption of majority status which, in circumstances such as this, may be rebutted.[6] The employer may lawfully refuse to bargain with the union if it rebuts the presumption by affirmatively establishing that the union has in fact lost its majority status, or shows that it has sufficient objective bases for reasonably doubting the union's continued majority status.[7] To establish sufficient objective bases, however, requires more than the mere assertion thereof based upon the employer's subjective frame of mind.[8] Furthermore, the employer must not have engaged in any conduct tending to encourage employee disaffection from the union.[9]

6. Cf. *N.L.R.B. v. Frick Company,* 423 F.2d 1327 (C.A. 3, 1970); *Keller Plastics Eastern, Inc.,* 157 NLRB 583 (1966).

7. *Celanese Corporation of America,* 95 NLRB 664, 672 (1951); *Peoples Gas System, Inc.,* 214 NLRB No. 141 (1974).

8. *Laystrom Manufacturing Co.,* 151 NLRB 1482 (1965), enforcement denied 359 F.2d 799 (C.A. 7, 1966); *Automated Business Systems, Inc., a Division of Litton Business Systems, Inc.,* 205 NLRB 532 (1973), enf. denied 497 F.2d 262 (C.A. 6, 1974).

9. *Peoples Gas System, Inc., supra.*

In *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho and its Employer-Members,* 213 NLRB No. 74, the Board held that these principles are equally applicable whether the union was certified by the Board or was recognized without Board certification. In that case, the Board held that the existence of a prior contract, lawful on its face, raised a presumption that the union was the majority representative at the time the contract was executed and also raised the presumption that the union's majority continued at least through the life of the contract. The Board held that "Following the expiration of the contract . . . the presumption continues and, though rebuttable, the burden of rebutting it rests on the party who would do so . . . ."

(2) The alleged actual loss of majority

For the reasons set forth above, the presumption of continued majority which flowed from the contract survived the change in the bargaining unit and applied to the single-employer unit. It follows that the change in the unit is not in itself proof that the Union no longer represented a majority of Respondent's employees.

In June 1974, the Union had about $11,000 in its treasury and that amount was decreasing. However, the Union's liabilities did not exceed its assets, and even if they did, the Union's financial condition would not indicate how many employees the Union actually represented. Even if Staff were correct in his estimate that there were about 30,000 employees in the Lake Tahoe and Reno areas who were employed in categories over which the Union had jurisdiction, that figure would not give any insight into how many employees the Union in fact did represent.

About that time the Union had approximately 900 or 1,000 members, of whom perhaps 20 percent were from the Lake Tahoe area. Between 700 and 800 were paid up in their dues. Those are industry-wide figures and there is no way to tell from them how many of Respondent's employees were union members. Even if Respondent had established that a majority of its employees were not members of the Union, such a showing would not be the equivalent of establishing a lack of desire of those employees for union representation. Employees may desire representation without wanting to join a union or pay dues. *Orion Corp.*, 210 NLRB 633, enf. 515 F.2d 81 (C.A. 7, 1975). As the Board stated in *Wald Transfer & Storage Co.*, 218 NLRB No. 73:

> It has been clearly established that a distinction exists between union membership and union support, foreclosing relying upon one as evidence of the other. Here, union membership being voluntary in this right-to-work State emphasizes that distinction. Many employees while approving of the Union may not choose to give it their financial support *or* participate as members.[3]

3. *See Terrell Machine Company*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), cert. denied 398 U.S. 929; *N.L.R.B. v. Gulfmont Hotel Company*, 362 F.2d 588, 592 (C.A. 5, 1966).

The fact that employees in the industry at the Lake did not attend a union meeting after announcements were placed in newspapers may indicate some apathy on the part of employees who happened to see the announcements. It does not indicate that a majority of Respondent's employees no longer desired to be represented by the Union.

The Union sought funds from the International to organize employees in the industry and to build up its membership so that it would have strength in negotiating the next contract. The Union also accepted International trusteeship. Those facts, however, do not indicate whether or not the Union represented a majority of Respondent's employees. The Union wanted to obtain more members in the industry and it engaged in some internal revisions, but it would be sheer speculation to make an evaluation based on those facts as to the number of Respondent's employees the Union actually represented.

Some of the bartenders at the Overland Hotel in Reno told Staff, in substance, that they were dissatisfied with the Union. There is no evidence in the record that any of the employees of Respondent ever expressed dissatisfaction with the Union to Staff.

The above matters in themselves, and when considered in connection with the matters set forth below relating to Respondent's claimed reasonable doubt as to the Union's majority, fall short of establishing that the Union in fact did not represent a majority of Respondent's employees.

(3) The alleged reasonably based doubt of the Union's majority status

The Board has long held that questions relating to an employer's reasonably based doubt as to a Union's continued majority cannot be resolved by the application of

any mechanical formulas and can only be answered "in the light of the totality of all circumstances involved in a particular case." *Celanese Corporation of America,* 95 NLRB 664. In the instant case Respondent has raised a number of matters on which it claims to have based a reasonable doubt as to the Union's majority. These matters must be considered in the context of the major disruption in the bargaining unit which occurred when Respondent withdrew from the Association, and also in the context of the filing by Respondent of a petition for an election. Respondent withdrew from the Association more than a month before it refused to bargain with the Union in the single-employer unit. Respondent contends that at the time of the withdrawal from the Association it doubted the Union's majority in the single-employer unit and disassociated itself from the Association because it thought that there might be some groups in the multiemployer unit that would sustain the Union's majority. Respondent's General Manager Konarske believed that it would not be to Respondent's advantage to stay in the Association. About the time of the withdrawal from the Association, Respondent's attorney, according to Konarske, "was to use any necessary method to get us disassociated from the Union." Respondent did not see fit to file a petition for an election until some 9 months after it refused to bargain with the Union.

Konarske, the official who made the decision to refuse to bargain with the Union, knew that Nevada was a right-to-work state. However, no inference can be drawn from that concerning whether or not the Union represented a majority of Respondent's employees. Cf. *Wald Transfer & Storage Co.,* 218 NLRB No. 73. Konarske also knew that no election had ever been held among its employees. However, the presumption of majority can be based on either

certification or voluntary recognition, and where an employer voluntarily recognizes a union, it cannot use that fact as a basis for doubting the union's majority. Cf. *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho, and its Employer-Members, supra.*

Konarske read in the newspapers and heard on the radio that the Union was in trusteeship and that the Union had financial difficulties. He could also gather from his conversations with supervisors and employees and from his observation of employees' union pins that the Union was engaging in organizational activities during the summer of 1974. The fact that the Union was undergoing internal revisions does not indicate whether or not it continued to represent a majority of Respondent's employees. A union may have financial difficulties whether or not it represents a majority, and organizational activity only indicates that a union desires more members than it has.

Konarske knew that there was a very substantial turnover among the bar and culinary employees. At first, he estimated that turnover at about 100 percent a year and later he concluded that it was even higher. High turnover is one circumstance, among others, that must be considered in determining whether an employer has a reasonably based doubt as to a union's majority status. *People's Gas System, Inc.,* 214 NLRB No. 141; *Convair Division of General Dynamics,* 169 NLRB 131; *Kentucky News, Inc.,* 165 NLRB 777. However, high employee turnover in itself is insufficient to establish a reasonable doubt as to a union's majority, and the Board has repeatedly held that new employees will be presumed to support a union in the same ratio as those they may replace. *Strange and Lindsey, Inc.,* 219 NLRB No. 190; *King Radio Corporation,* 208 NLRB 578, enf. 510 F.2d 1154 (C.A. 10, 1975).

Konarske knew that some of the employees were dissatisfied with the Union. Employee Gau told Konarske that she had no interest in the Union and that she had no intention of supporting the Union. Employee Ronzo told Konsarke that he (Ronzo) had no respect for the Union. Employee Dungan told Konarske that she did not feel that the Union was necessary and that she did not want to pay dues to the Union. Employee Schu told Koranske that he (Schu) was not interested in the Union and was getting fed up with them. Employee Harbaugh told Konarske that he (Harbaugh) was satisfied with conditions and that there was no advantage to belonging to the Union. Employee Curreo told Konarske that they were satisfied with management's working conditions.

In all, there were six employees who expressed some dissatisfaction with the Union to Konarske. Four of those employees also told Konarske that other employees were dissatisfied. Gau told him that most of the girls were not interested in belonging to the Union. Ronzo told him that the Company should not be concerned about the Union because the Union got little support from the cooks and they were satisfied and pleased with working conditions as established by management. Dungan told him that he did not have to worry about the cocktail waitresses and barboys because, with one exception, none of them were concerned about the Union and that they didn't feel the Union was necessary for their welfare. Curreo told him that the Company did not have to worry about the cooks supporting the Union and that almost everybody was against the Union.

Respondent contends that it had reasonable basis for doubting the Union's continued majority. It cannot successfully support that contention through the testimony of Konarske that four employees told him that unnamed other

employees were displeased with the Union. Under the circumstances, Konarske could have had no way of evaluating whether those four employees were basing their opinion as as to the other unnamed employees on fact, conjecture or rumor.

Six named employees did express some displeasure with the Union to Konarske. Even if those expressions of displeasure can be equated with a desire on behalf of those employees not to be represented by the Union,[22] Respondent has fallen far short of establishing that a majority of the employees in the bargaining unit did not want the Union to represent them. Six out of the 165 or more employees in the bar and culinary unit expressed displeasure with the Union to Konarske. The number that had expressed displeasure was insubstantial with relation to the overall employee complement in the unit and Respondent could not base a reasonable doubt of majority on such a limited number of remarks. Cf. *Strange and Lindsey Beverages, Inc., supra; Cornell of California, Inc.*, 222 NLRB No. 38.

Konarske also spoke to supervisors concerning the status of the Union. Bar Manager Connor told Konarske that there was no problem among the cocktail waitresses or busboys, but that he was uncertain whether or not the bartenders would support the Union. Hotel and Food Manager Henderson told Konarske that they didn't have a thing to worry about and that the girls were not supporting the Union. Henderson reported to Konarske a remark made by Supervisor Rightman to the effect that there would be no problem with the Union with relation to the girls and

22. See *Strange and Lindsey Beverages, Inc., supra*, in which the Board held that statements by employees that they did not want to pay money to the union or that they did not want to get involved did not indicate that those employees no longer wanted to be represented by the union.

busboys and that there would be no support for the Union from them. In addition, Henderson told Konarske that in his (Henderson's) opinion the Union lacked support in the culinary workers unit and that there was a lack of interest in the Union. However, the subjective evaluations of supervisors cannot be used as a basis for reasonably doubting a union's majority. As the Board held in *Terrell Machine Company,* 173 NLRB 1480, enf. 427 F.2d 1088 (C.A. 4, 1970), cert. denied 398 U.S. 929 (1970):[23]

> To be of any significance, the evidence of dissatisfaction with a validly recognized incumbent Union must come from the employees themselves, not from the employer on their behalf.

The Union did not process any formal or informal grievances from the time Respondent opened in 1958 until about June 18 or 19, 1974, when Union Representative Lawrence contacted Supervisor Rightman concerning certain discharges. However, there is no showing that there were any contract violations calling for grievances or that the Union was inactive in representing the employees in the unit at any time. Lack of activity by a union is one factor to be considered in evaluating whether a company has a reasonable doubt of the union's majority. *Taft Broadcasting,* 201 NLRB 801. However, other than the lack of grievances, Respondent has not established such a lack of activity. Union agents were on the premises throughout the years and successive contracts were in effect until Respondent refused to bargain. There is no showing that the Union failed in its responsibility to represent the employees.

23. In finding a violation in the *Terrell* case, the Board noted: "That the Respondent could have filed a petition for an election, or asked that the Union do so, in order to resolve its alleged doubt, but it took no such steps."

In *United Supermarkets, Inc.,* 214 NLRB No. 142, the Board found that an employer did not have a reasonable doubt based on objective facts as to the union's continued majority status. The Board held:

> A showing of such doubt requires more than an employer's mere assertion of it, and more than proof of an employer's subjective frame of mind. The assertion must be supported by objective considerations, that is, some substantial and reasonable grounds for believing the union has lost its majority status. [Footnotes omitted.]

After considering all the factors set forth above, I conclude that Respondent did not have substantial and reasonable grounds for believing that the Union has lost its majority status. Respondent's assertion in that regard was based on subjective rather than objective considerations. In sum, I find that the presumption of continued majority has not been rebutted either by a showing that the Union, in fact, lost its majority status or by a showing that Respondent had a sufficient objective basis for reasonably doubting the Union's continued majority.[24] In addition, as found below, Respondent violated Section 8(a)(1) of the Act by announcing and granting across-the-board wage increases for its cooks, waitresses and busboys in September 1974 in order to induce employees to abandon their support for the Union. Thus, at the time of the refusal to bargain, Respondent was engaging in conduct tending to encourage employee disaffection from the Union.[25] Cf. *James W. Whit-*

24. Cf. *N.L.R.B. v. Thompson, Inc.,* ..... F.2d ..... (C.A. 5, 1976), 91 LRRM 2137.

25. The other violations of the Act found below occurred after October 25, 1975, when Respondent claimed to doubt the Union's majority status and refused to bargain.

field d/b/a Cutten Supermarket, 220 NLRB No. 64. I find that Respondent refused to bargain with and withdrew recognition from the Union in violation of Section 8(a)(5) and (1) of the Act as alleged in the complaint.

C. *The Other Violations Alleged in the Complaint*

1. The alleged independent Section 8(a)(1) violations

The parties stipulated, and I find, that on an unknown date in September 1974, Respondent announced and granted across-the-board wage increases for its cooks, waitresses and busboys. The contract that was in effect at that time provided in part:[26] "The Employer is granted the right to increase any privileges, benefits or wages provided for by this Agreement." The General Counsel does not contend that the increase constituted a violation of the contract or a refusal to bargain with the Union. He does contend, however, that the increase violated Section 8(a)(1) of the Act in that it was announced and granted to induce employees to abandon their support for the Union. Respondent did not give prior notification to or consult with the Union prior to the increase. Respondent's General Manager Konarske testified that the increase was granted on about September 17, 1974, because a competitor, the North Shore Club, had opened near Respondent, that club had attracted some of Respondent's kitchen employees and waitresses, and Respondent had to do something to counteract the competition. Konarske also testified that article I, section 6 of the contract permitted Respondent to do so.

26. The full text of article I, section 6 of the contract is set forth above.

The parties stipulated and I find that on an unknown date in December 1974, Respondent announced, and later on or about January 1, 1975 put into effect, certain employee service recognition pay, holiday pay and birthday pay programs. The announcement of the recognition pay program indicated that a recognition program had previously been in effect which paid service pay each Christmas and that the new program changed the time of payment to the employees' anniversary date as well as extending the program to provide for employees who worked for 30 or more years. Another announcement related to holiday and birthday pay. That provided that a new benefit was to be effective January 1, 1975, that granted time and a half pay to employees who worked on seven named holidays. It also provided that in addition to the holiday pay all employees would receive as a birthday bonus either double time pay for their birthday if their birthday fell on a regular workday and they had to work, or straight-time pay if their birthday fell on their normal day off and they did not work. All these benefits were granted without prior notification to or consultation with the Union. Respondent offered no evidence with regard to the reason for granting those benefits.

The parties stipulated and I find that on an unknown date in January 1975 Respondent announced and granted to employees in the bargaining unit time and a half pay for a 6th consecutive day worked, whereas prior to that the employees in the unit had received straight time for having worked an additional 6th day. The increase was announced and granted without prior notification to or consultation with the Union. Respondent offered no evidence concerning the reason for the increase.

The parties stipulated and I find that on an unknown date in February 1975 Respondent announced, and on February 15, 1975 Respondent instituted, a dental insurance plan covering its employees, including those employees in the bargaining unit. The plan was announced and instituted without prior notification to or consultation with the Union. Respondent offered no evidence with regard to the reason for the institution of the plan.

Whether or not the Union waived its right to bargain about increases in employee benefits during the term of the contract, Respondent was still subject to the provisions of Section 8(a)(1) of the Act. It could not lawfully grant benefits in order to induce employees to abandon their support for the Union.

Respondent granted the across-the-board wage increases for its cooks, waitresses and busboys on about September 17, 1974. It was on September 17, 1974, that Respondent withdrew from the Association. Respondent believed that it would not be to its advantage to stay in the Association and Respondent's General Manager Konarske acknowledged that Respondent's attorney "was to use any necessary method to get us disassociated from the Union." Konarske's own choice of language clearly establishes that he was strongly motivated to avoid continued unionization. That animus was manifested at about the same time that Respondent granted the across-the-board wage increases for its cooks, waitresses and busboys. Konarske's bare assertion that Respondent had to meet competition from another club was unconvincing. There is no evidence in the record concerning the competitor's wage structure, nor is there enough detail in Konarske's testimony with regard to Respondent's competitive position to give that testimony meaningful weight. Respondent introduced no testimony to

shed light on its past practices or established procedures with regard to wage increases.

In December 1974, Respondent changed and improved its service recognition pay program and provided holiday pay and birthday pay. In January 1975, Respondent improved the pay for 6th consecutive day worked. In February 1975, Respondent instituted a dental insurance plan. Respondent introduced no evidence with regard to the reason for those changes. Nor did Respondent introduce any testimony to shed light on past practices or established procedures with regard to improvements in benefits.

Under all these circumstances, I find that Respondent announced and granted the wage increases and the employment benefits described above in order to induce employees to abandon their support for the Union, thereby violating Section 8(a)(1) of the Act.

2. The alleged unilateral change violation of Section 8(a)(5) of the Act

The complaint also alleges that Respondent refused to bargain in violation of Section 8(a)(5) of the Act by unilaterally instituting the dental insurance plan described above.

As is set forth above, article I, section 6 of the contract that expired on November 30, 1974, provided that the employer was granted the right to increase any privileges, benefits or wages provided for by the agreement. In addition, article II, section 4 A of that contract provided:

> The Employer agrees that all employees covered by this Agreement shall be entitled to and shall receive the same insurance benefits provided for the other employees of the Employer working at the establishments and/or locations referred to herein.

The General Counsel argues that article I, section 6 of the contract has no application to Respondent's institution of a dental insurance plan because that benefit was newly created and was not an increase in "benefits . . . provided for by this agreement." I believe that the General Counsel's reading of the contract is unduly restrictive. The contract provides for a number of benefits. Anything additional granted to employees is an increase in those benefits. For example, if two benefits are provided in a contract, a third benefit, even if it is entirely new, is an increase in the benefits already provided for by the contract. As the heading of article I, section 6 states: *"Employer May Increase Benefits, Privileges and Wages Without Prejudice."* I do not believe that the contract can be fairly read to mean that the employer could freely raise wages in any amount but was narrowly restricted in the type of benefits it could add. In addition, the institution of the dental insurance plan was permitted by another section of the contract. Article II, section 4 A, which is set forth above, provides that all employees covered by the agreement shall be entitled to and receive the same insurance benefits provided for the other employees of the employer working at the establishment. It was stipulated that the dental insurance plan covered Respondent's employees, including those employees in the unit. Thus, it appears that nonunit employees also received the dental insurance benefits. The contract, therefore, not only allowed Respondent to grant the same insurance benefits to the unit employees but required that it be granted. However, the Union's contractual waiver of its right to bargain about the dental insurance plan was not in effect in February 1975 when the plan was announced and instituted. The contract expired on November 30, 1974, and the contractual waivers contained in article I, section 6 and article II, section 4 A of the contract also expired at that

time. As found above Respondent unlawfully refused to bargain with the Union on October 25, 1974. Respondent's obligation to bargain in good faith with the Union is a continuing one and was in effect after November 30, 1974, when the contract expired. Once the contract expired, Respondent had the obligation to maintain existing wages and benefits while bargaining in good faith with the Union concerning any changes. There was no contract outstanding and therefore Respondent could not rely on any contractual right to make unilateral changes. Even if the waiver provisions could be considered part of the wage and benefit package that had to remain unchanged and subject to bargaining after the expiration of the contract, Respondent could not use those provisions to justify a unilateral change while unlawfully refusing to recognize and bargain with the Union. In addition, that change in benefits was one of many changes that were unlawfully made to induce employees to abandon their support for the Union. In the circumstances described above, Respondent unilaterally and without prior notification to or consultation with the Union instituted the dental insurance plan.[27] By doing so, Respondent violated Section 8(a)(5) and (1) of the Act.[28]

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, as set forth in Section III, above, occurring in connection with the operations of Re-

27. The complaint does not allege nor does the General Counsel urge a finding that the other wage and benefit changes were in violation of Section 8(a)(5) of the Act. Therefore, no findings are made in that regard.

28. Cf. *Guerdon Industries, Inc., Armour Mobile Homes Division*, 218 NLRB No. 69; *N.L.R.B. v. Benne Katz, d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736 (1962); *Mosher Steel Company*, 220 NLRB No. 47.

spondent described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent is engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Nothing contained in the recommended Order will require or permit Respondent to withdraw or discontinue any wage increase or other employee benefit already granted.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unlawfully withdrawing recognition from the Union and by refusing to bargain with the Union as the exclusive representative of its employees in the aforesaid appropriate unit, I recommend that Respondent be ordered to recognize and, upon request, bargain in good faith with the Union as the exclusive representative of its employees in that unit.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the policies of the Act for the Board to assert jurisdiction.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By announcing and granting wage increases, by announcing and granting improved pay for service recogni-

tion, holidays, birthdays and a 6th consecutive day worked, and by instituting a dental insurance plan, all to induce employees to abandon their support for the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. All employees employed by the Respondent in its bar and culinary operations at its Crystal Bay, Nevada operations, excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

6. By withdrawing recognition from the Union and by refusing to bargain with the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By unilaterally instituting a dental insurance plan without notification to or consultation with the Union, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) of the Act.

8. By the foregoing conduct, Respondent has interfered with, restrained and coerced employees in the exercise of rights guaranteed by Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[29]

ORDER

Respondent, Nevada Lodge, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Announcing or granting any wage increase or employee benefit to induce employees to abandon their support for the Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO. Nothing contained in this Order will require or permit Respondent to withdraw or discontinue any wage increase or other employee benefit already granted.

(b) Refusing to recognize and bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive representative of its employees in the following bargaining unit:

> All employees employed by it in its bar and culinary operations at its Crystal Bay, Nevada operations, excluding all other employees, guards and supervisors as defined in the Act.

(c) Unilaterally instituting any employee benefit without bargaining in good faith with said Union.

29. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(d) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive representative of its employees in the unit described above.

(b) Post at its Crystal Bay, Nevada facility copies of the attached notice marked "Appendix."[30] Copies of said notice on forms provided by the Regional Director for Region 20, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within twenty (20) days from the date of this Order what steps it has taken to comply herewith.

Dated: March 8, 1976

RICHARD D. TAPLITZ
Richard D. Taplitz
Administrative Law Judge

30. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix C

FORM NLRB—4727
(9-69)

NOTICE TO
EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE
UNITED STATES GOVERNMENT

We hereby notify you that:

WE WILL NOT announce or grant any wage increase or employee benefit to induce employees to abandon their support for the Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO. Nothing contained herein will require or permit us to withdraw or discontinue any wage increase or employee benefit already granted.

WE WILL NOT refuse to recognize and bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive representative of our employees in the following bargaining unit:

All employees employed by us in our bar and culinary operations at our Crystal Bay, Nevada operations, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally institute any employee benefit without bargaining in good faith with said Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL recognize and, upon request, bargain in good faith with said Union as the exclusive representative of our employees in that unit.

NEVADA LODGE
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, 450 Golden Gate Avenue, Box 36047, San Francisco, California 94102, Telephone Number: (415) 556-0335.